SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

TRUCK DRIVERS LOCAL UNION No. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I [File endorsement omitted]

In the United States Court of Appeals for the Second Circuit

No. —

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., PETITIONER

AND

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENTS

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed February 3, 1955.

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

The Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., files this petition on behalf of itself and its members, employees of the various employers hereinafter mentioned, pursuant to the provisions of Section 10 (f) of the Labor-Management Relations Act of 1947 (61 Stat. 136; 29 U. S. C. Sec. 160 (f)) for a review of the decision and order of the National Labor Relations Board entered at Washington D. C. on July 26, 1954, dismissing the complaint, in which the petitioner was
II the charging party, and Buffalo Linen Supply Company; Famous Linen Supply Company, Inc.; Buffalo General Laundries Corporation; Modern Linen Supply Company, Morgan Linen Supply, Inc.; The Office Towel Supply Company, Inc.; Walkers Laundry and Linen Supply; and Linen and Credit Exchange, an unincorporated association, were respondents, N. L. R. B. Case No. 3-CA-694.

Linen and Credit Exchange is an unincorporated association consisting of the above-mentioned corporations, and Frontier Linen Supply, Inc.

In support of this petition, Truck Drivers Local Union No. 449 respectfully shows:

I

Jurisdiction

Petitioner is an unincorporated association consisting of seven or more persons and a labor organization within the meaning of Section 2 (5) of the Labor Management Relations Act of 1947. Its principal office and place of business is in the city of Buffalo, County of Erie, State of New York where it is the collective bargaining agent of the employees of the members of Linen and Credit Exchange, among others.

As will hereinafter more fully appear, the unfair labor practices of the members, excepting Frontier Linen Supply, Inc., (hereinafter referred to as Frontier), of Linen and Credit Exchange, (hereinafter referred to as the Exchange), were committed and occurred within the County of Erie, State of New York, and within the jurisdiction of this Court. This Court, has therefore, jurisdiction of this petition by virtue of Section 10 (f) of the Labor-Management Relations Act of 1947.

III II

Statement of Proceeding

The Exchange, acting for its members, does and has for some time recognized Local 449 as the exclusive bargaining agent for all of its employees.

A collective bargaining agreement dated April 30, 1952, between the Exchange and the Union, each for its members, stated that such agreement would run until April 20, 1953, and from year to year thereafter unless a 60 day written notice of a desire to change should be given by either party before any expiration date. The Union served the required notice and negotiations began sometime in March, 1953. On May 26, 1953, the employees at Frontier went on strike. On the night of May 26, 1953, at a negotiation meeting and at one or two subsequent meetings, the Exchange informed the Union that the employees of the

other members of the Exchange were locked out because of the strike at Frontier and that if Local 449 would withdraw its picket line and cease the strike at Frontier, the employees of the other members of the Exchange would be permitted to return to work.

On June 3, 1953, an agreement for a new contract was reached and thereupon the strike and picket line at Frontier were terminated.

On July 2, 1953, the General Counsel of the Board issued a complaint, based on charges filed by petitioners herein, alleging in substance that the Exchange had engaged in unfair labor practices proscribed by Section 8 (a) (3) and 8 (a) (1) of the Labor Management Relations Act of 1947, hereinafter referred to as the Act, by laying off the employees because of their union membership or their participation in union or other concerted activities.

IV The employers answering through the Exchange denied that the facts constituted the commission of unfair labor practices.

A hearing was had in Buffalo, New York on September 8, 1953, and no evidence was offered by any party and facts as related were established by admission in the answer of the Exchange and by stipulation at the hearing.

In November, 1953, the Trial Examiner for the Board issued an Intermediate Order containing findings of fact and conclusions of law. In substance he found that the locking out of the employees under the facts constituted an unfair labor practice as charged, and recommended the relief, typical and appropriate to such a finding, including the back pay awards to the employees locked out, and on whose behalf this petition is made.

The National Labor Relations Board, the respondent herein, adopted the findings of fact, but concluded that the strike of one member of a multi-employer unit, *per se*, made the act of the other employer members in locking out their employees, defensive and privileged in nature, absent evidence of anti-union motivation. *Citing Leonard, et al. d/b/a Davis Furniture Company et al. v. N. L. R. B.*, 205 F. 2d 355 C. A. 9. Whereupon, on July 26, 1954, the Board, with Member, Abe Murdock dissenting, dismissed the complaint.

V III

Assignments of Error

Petitioner, as a basis for review, makes the following assignments of error, to wit:

1. The Board's dismissal of the complaint herein is contrary to the law and is not supported by any substantial evidence.

2. The Board's refusal to find as conclusions of fact and conclusions of law the commission of the unfair labor practice alleged in the complaint is erroneous, contrary to law, without substantial evidence and contrary to the evidence set forth in the record.

3. The evidence provides no reasonable or substantial basis for a finding that the lockout of employees was defensive and privileged in nature rather than retaliatory and unlawful.

4. The Board erred in concluding that a group of employers can lockout their employees solely because of a strike at the plant of another associated with them in collective bargaining.

5. The Board erred in concluding that the lockout of employees under the facts in this case was for just cause.

6. The Board erred in concluding that a lockout of employees can be justified under the Labor Management Relations Act of 1947.

VI IV

Prayer

WHEREFORE, petitioner prays for a review of the decision, findings and order of the National Labor Relations Board and that:

1. A copy of this petition be served upon respondents;
2. That said decision, findings and order be in each and all respects, annulled and set aside;

3. That petitioner shall have such other and further relief as may be just and proper in the premises.

McMAHON & CROTTY,
Attorneys for Petitioner,
Office and P. O. Address,
1028 Liberty Bank Building,
Buffalo, New York,
By PETER J. CROTTY, ESQ.

VII In the United States Court of Appeals for the Second Circuit

[Title omitted]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD—Filed February 10, 1956

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

Comes now the National Labor Relations Board, herein called the Board, and pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 141, *et seq.*), files this answer to the petition to review and set aside an order of the Board.

1. The Board admits the allegations contained in paragraph 1 of the petition for review, except that the Board denies that any of the conduct referred to therein constituted unfair labor practices violative of the National Labor Relations Act, as amended.

2. Answering the allegations contained in paragraph II of the petition for review, the Board prays reference to the certified copy of the entire record of the proceedings before the Board, filed herein, for a full and exact statement of the pleadings, evidence, exhibits, rulings, findings of fact, conclusions of law and order of the Board, and all other proceedings had in this matter before the Board.

3. The Board denies each and every allegation of error contained in paragraph II of the petition for review,
VIII and avers that its order is proper in all respects.

WHEREFORE, the Board respectfully prays this Honorable Court that said petition be denied.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this 9th day of February, 1955.

IX [File endorsement omitted.]

1 BEFORE NATIONAL LABOR RELATIONS BOARD

In the Matter

of

BUFFALO LINEN SUPPLY COMPANY; FAMOUS LINEN SUPPLY COMPANY, INC., BUFFALO GENERAL LAUNDRIES CORP., MODERN LINEN SUPPLY COMPANY; MORGAN LINEN SUPPLY, INC.; THE OFFICE TOWEL SUPPLY COMPANY, INCORPORATED; WALKERS LAUNDRY AND LINEN SUPPLY; AND LINEN AND CREDIT EXCHANGE (Unincorporated),

and

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.

Case No. 3-CA-694

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

5.28.53 Charge against employers filed.
6.23.53 First amended charge against employers filed.
7. 2.53 Complaint issued by the Regional Director.
7. 2.53 Notice of Hearing issued by the Regional Director.
7. 8.53 Respondent Companies' Answer filed.
9. 8.53 Order issued designating George A. Downing Trial Examiner for the Board.
9. 8.53 Hearing opened.
9. 8.53 Hearing closed.
11.10.53 Trial Examiner's Intermediate Report and Recommended Order issued.

11.12.53 Erratum correcting Intermediate Report issued.
12.14.53 Respondent Companies' Exceptions to the Intermediate Report filed.
7.26.54 Decision and Order issued by the Board.

2 BEFORE NATIONAL LABOR RELATIONS BOARD

COMPLAINT—Filed July 2, 1953

It having been charged by Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, that Buffalo Linen Supply Co., herein called Respondent Buffalo Linen, Famous Linen Supply Co., Inc., herein called Respondent Famous, Buffalo General Laundries Corp. (Merchants Linen Supply Division), herein called Respondent Buffalo General, Modern Linen Supply Company, herein called Respondent Modern, Morgan Linen Supply, Inc., herein called Respondent Morgan, The Office Towel Supply Company, Incorporated, herein called Respondent Office Towel, Walkers Laundry and Linen Supply, herein called Respondent Walkers, and Linen and Credit Exchange (Unincorporated), herein called Respondent Exchange, and collectively herein called Respondents, have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Third Region, designated by the Board's Rules and Regulations—Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I

Respondents, Buffalo Linen, Famous, Buffalo General, Modern, Morgan, Office Towel and Walkers are, and at all times herein material have been, corporations duly organized under and existing by virtue of the laws of the State of New York, and are, and at all times herein material have been, members of Respondent Exchange.

3 II

Respondent Buffalo General, at all times hereinafter mentioned, has maintained its principal office and place

of business at 238 Fargo Avenue, Buffalo, New York and operates plants located at 714 Northland Avenue and 21 Northland Avenue, Buffalo, New York, where it is now, and continuously has been, engaged in the laundry and dry cleaning business and in furnishing, supplying, and servicing industrial and commercial enterprises with cotton and linen uniforms, towels and other related products. The plant herein involved is located at 21 Northland Avenue, Buffalo, New York, and is known as the Merchants Linen Supply Division.

Respondent Buffalo General, in the course and conduct of its business operations during the calendar year 1952, a representative period, purchased soaps, detergents, water softeners, cotton and linen goods, towels, uniforms and other supplies and equipment valued at in excess of $500,000, all of which was purchased outside the State of New York and shipped directly to its places of business in Buffalo, New York. During the same period, Respondent Buffalo General performed laundry and dry cleaning services for, and furnished, supplied and serviced industrial and commercial enterprise with cotton and linen towels, uniforms, and other related items for which it received in excess of $1,000,000, in excess of 20 per cent of which was received from industrial and commercial enterprises which annually ship goods, merchandise or equipment valued in excess of $25,000 outside the State of New York.

4 III

Respondent Office Towel, at all times hereinafter mentioned, has maintained its principal office and place of business in Buffalo, New York, where it is now, and continuously has been, engaged in the furnishing, supplying and servicing industrial and commercial enterprises with cotton and linen towels, uniforms and other related items.

Respondent Office Towel, in the course and conduct of its business operations during the calendar year 1952, a representative period, purchased soaps, detergents, water softeners, cotton and linen goods, towels, uniforms and other supplies and equipment valued at approximately $150,000, of which approximately 50 per cent was purchased outside the State of New York and shipped directly to its place of business in Buffalo, New York. During the same

period, Respondent Office Towel furnished, supplied, and serviced industrial and commercial enterprises with cotton and linen towels, uniforms and other related items for which it received income in excess of $500,000, in excess of 20 per cent of which was received from industrial and commercial enterprises which annually ship goods, merchandise or equipment valued in excess $25,000 outside the State of New York.

IV

Respondent Morgan, at all times hereinafter mentioned has maintained its principal office and place of business at 325 Louisiana Street, Buffalo, New York and operates plants located in Buffalo, Niagara Falls and Dunkirk, New York where it is now and continuously has been engaged in the furnishing, supplying and servicing industrial and commercial enterprises with cotton and linen uniforms, towels and other related items.

Respondent Morgan, in the course and conduct of its business operations during the calendar year 1952, a representative period, purchased soaps, detergents, water softeners, cotton and linen goods, towels, uniforms and other supplies and equipment valued at approximately $150,000, of which approximately 50 per cent was purchased outside the State of New York and shipped directly to its places of business in Buffalo, Niagara Falls and Dunkirk, New York. During the same period, Respondent Morgan furnished, supplied, and serviced industrial and commercial enterprises with cotton and linen uniforms, towels and other related items for which it received income in excess of $500,000, in excess of 20 per cent of which was received from industrial and commercial enterprises which annually ship goods, merchandise or equipment valued in excess of $25,000 outside the State of New York.

V

Respondents Buffalo Linen, Famous, and Modern at all times hereinafter mentioned have maintained their principal offices and places of business in Buffalo, New York, and Respondent Walkers has maintained its principal office and place of business in Niagara Falls, New York, where they all are now and continuously have been engaged in furnishing, supplying and servicing industrial and commer-

cial enterprises with cotton and linen towels, uniforms and other related items.

Each of the Respondents named in the above paragraph, in the course and conduct of its business operations
6 during the calendar year 1952, a representative period, purchased soaps, detergents, water softeners, cotton and linen goods, towels, uniforms and other supplies and equipment valued at in excess of $100,000, all of which was purchased outside the State of New York and shipped directly to its place of business in New York State. During the same period each of the aforementioned Respondents furnished, supplied and serviced industrial and commercial enterprises with cotton and linen towels, uniforms and other related items for which it received income in excess of $200,000, in excess of 25 per cent of which was received from industrial and commercial enterprises which annually ship goods, merchandise and equipment valued in excess of $25,000 per year outside the State of New York.

VI

Respondent Linen and Credit Exchange (unincorporated) is and has been for many years a voluntary association consisting of approximately eight (8) members who are employers engaged in furnishing, supplying and servicing industrial and commercial enterprises with cotton and linen towels, uniforms and other related items. At all times herein mentioned Respondent Exchange has maintained its principal office and place of business at Buffalo, New York. One of the purposes of Respondent Exchange is to obtain uniformity and stability in labor relations between its members and the various labor organizations representing employees of its members. Among the activities of Respondent Exchange are the conduct of labor negotiations and the execution of labor contracts on behalf of all members of Respondent Exchange including Respondents Buffalo Linen, Famous, Buffalo General, Modern, Morgan,
7 Office Towel and Walkers, with unions representing employees of the various members of Respondent Exchange. Respondents Buffalo Linen, Famous, Buffalo General, Modern, Morgan, Office Towel and Walkers are now, and have been for many years, members of the Buffalo Linen and Credit Exchange.

The members of Respondent Exchange, in the course and conduct of their business operations during the calendar year 1952, a representative period, purchased soaps, detergents, water softeners, cotton and linen goods, towels, uniforms and other supplies and equipment valued in excess of $2,000,000, in excess of 80 per cent of which was purchased outside the State of New York and shipped directly to their places of business in New York State. During the same period, the members of Respondent Exchange supplied and serviced industrial and commercial enterprises with cotton and linen towels, uniforms and other related items for which they received income in excess of $4,000,000 in excess of 20 per cent of which was received from industrial and commercial enterprises which annually ship goods, merchandise or equipment valued in excess of $25,000 outside the State of New York.

VII

Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, herein called the Union, is, and at all times material herein has been, a labor organization within the meaning of Section 2 (5) of the Act.

8

VIII

Respondents did on or about May 27, 1953 discharge those employees whose names are set forth in Appendix A annexed hereto and made a part hereof and did thereafter fail or refuse to reinstate them until June 3, 1953.

IX

Respondents did discharge and thereafter did fail or refuse to reinstate the employees, as alleged in Paragraph VIII above, for the reason that they joined or assisted the union or engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

X

Respondents, by the acts described above in Paragraph VIII and for the reasons set forth in Paragraph IX above, did discriminate and are discriminating in regard to the

hire or tenure or terms or conditions of employment of the employees named above in Paragraph VIII and thereby did engage in, and are engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

XI

By the acts described above in Paragraphs VIII and IX, and by each of said acts, Respondents did interfere with, restrain and coerce, and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

9

XII

The acts of Respondents, described above in Paragraphs VIII and IX, occurring in connection with the operations of Respondents described above in Paragraphs I, II, III, IV, V and VI have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XIII

The acts of Respondents, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3), and Section 2 (6) and (7) of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board on behalf of the Board, by the Regional Director for the Third Region on this 2nd day of July, 1953, issues this Complaint against Buffalo Linen Supply Co., Famous Linen Supply Co., Inc., Buffalo General Laundries Corp., Modern Linen Supply Company, Morgan Linen Supply, Inc., The Office Towel Supply Company, Incorporated, Walkers Laundry and Linen Supply, and Linen and Credit Exchange (unincorporated), Respondents herein.

MERLE D. VINCENT, JR.,
Regional Director,
National Labor Relations Board,
Third Region.

10 APPENDIX A TO COMPLAINT

Buffalo Linen Supply Co. and Linen and Credit Exchange did discharge:

Joseph Homer
Joseph Gerace

Famous Linen Supply Co., Inc. and Linen and Credit Exchange did discharge:

Philip Trifiro
Carl Maiorana
Sam Scibetta
Al Scibetta
Hank Legatzke
Norm Axford
Don Herberger
John Feraci

Buffalo General Laundries Corp. (Merchants Linen Supply Division) and Linen and Credit Exchange did discharge:

James Chambers
Robert Thompson
John H. Monaco
Ray Butler
James J. Finnerty
Ken Beiter
Charles Redanz
Edward Johnson
William Mullane

Modern Linen Supply Company and Linen and Credit Exchange did discharge:

Charles Scibetta
Francis Gigante
Robert Pabeljack

Morgan Linen Supply, Inc. and Linen and Credit Exchange did discharge:

Matty Comella
Joe Zarcone
Ed Kinney
George Meisenburg
John Calabro
Charles Sanfilippo
Tony Muecio
Dominic Guericio
Ed Wojciak
Carmen Mambrino
Angelo Abrams
Mike De Angelo
Leonard Pinkowski
Leonard Kuzora

11

John Balcerzak
Sam Greco
Emil Guglielmo
Louis Butkowski
James Maggio
Richard Kalfas
Donald Dugan
Joe Verone
Charles Seward

The Office Towel Supply Company, Incorporated and Linen and Credit Exchange did discharge:

Earl Wagner	John Christiano
J. Dix	Angelo Gerace
Leonard Slawiak	Pascal Ipolito
Harry Thorpe	Wilfred Monette
Gordon Ford	James Irwin
Bill Bailey	Sylvester Eich
John MacGregor	Eugene Monette
Howard Walmuth	James Shufelt
	Henry Kujawa

Walkers Laundry and Linen Supply and Linen and Credit Exchange did discharge:

Felice Ruggiero	Paul Pascuzzi
Ted Colaty	Harry Pitcher

BEFORE NATIONAL LABOR RELATIONS BOARD

ANSWER—FILED JULY 8, 1953

Respondents for the answer to the complaint in the above entitled proceeding:

1. Admit the allegations contained in paragraphs I, II, III, IV, V, VI, and VII.

2. Denies the allegations contained in paragraphs VIII, IX, X, XI, XII, and XIII.

12 3. Denies all other allegations of said complaint not otherwise admitted, denied or controverted.

WHEREFORE, respondents demand dismissal of the complaint herein, together with such other relief as may be just and proper.

The foregoing answer is submitted on behalf of all respondents by the respondent.

LINEN AND CREDIT EXCHANGE,
Morgan Building,
Buffalo, New York.
By JOHN A. MULLANE,
Secretary.

Duly sworn to by John A. Mullane, jurat omitted in printing.

13 [Title Omitted.]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRD REGION

STENOGRAPHIC TRANSCRIPT OF TESTIMONY AT HEARING OF SEPTEMBER 8, 1953

350 Ellicott Square Building,
Buffalo, New York,
Tuesday, September 8, 1953.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a. m., d. s. t.
Before:

George A. Downing, Esq., Trial Examiner.

APPEARANCES:

William J. Cavers, Esq., 350 Ellicott Square Building, Buffalo, New York, appearing as counsel for the General Counsel of the National Labor Relations Board.

14 Louis Borins, Esq., Borins & Hoffman, 922 Rand Building, Buffalo 3, New York, appearing on behalf of the Respondents.

Mr. Donald E. Wells, 475 Franklin Street, Buffalo, New York, appearing on behalf of Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, the Charging Party.

• • • • •

MOTIONS TO AMEND THE COMPLAINT AND RULINGS THEREON

• • • • •

Mr. Cavers: Mr. Examiner, at this time the General Counsel makes the following motions: The first motion is to amend Paragraph VIII of the Complaint to strike from the first line of Paragraph VIII the third to the last word in that line, the word "discharge" and to insert in place of the word "discharge" the word "layoff" so that after amendment Paragraph VIII will read: "Respondents did

on or about May 27, 1953 lay off those employees whose names are set forth in Appendix A annexed hereto and made a part hereof and did thereafter fail or refuse to reinstate them until June 3, 1953."

The second motion the General Counsel moves to amend Paragraph IX of the Complaint by striking from the first line thereof the third word "discharge" and insert in place of that word the words "lay off", so that after amendment Paragraph IX will read: "Respondents did lay off and thereafter did fail or refuse to reinstate the employees, as alleged in Paragraph VIII above, for the reason that they joined or assisted the union or engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Trial Examiner Downing: Any objections?

Mr. Borins: I have no objection, Mr. Examiner. May I proceed from that point on, sir?

Trial Examiner Downing: Any objection from the Union?

Mr. Wells: No.

Trial Examiner Downing: The amendments will be allowed.

Mr. Borins: The Linen and Credit Exchange as members whom I represent admit amended Paragraph VIII and deny amended Paragraph IX.

Trial Examiner Downing: Any objection to the proposed amendment of the Answer?

Mr. Cavers: No objection from the General Counsel.

Trial Examiner Downing: Any objection from the Union?

Mr. Wells: No.

Trial Examiner Downing: The amendment will be allowed.

STIPULATIONS

Mr. Cavers: In an off the record discussion, Mr. Examiner, it was stipulated by and among counsel for the General Counsel, the counsel for the Respondents and the Charging Party as follows: The employees referred to in Paragraph VIII of the Complaint were laid off for the reason that their bargaining representative, Local 449, had engaged in a strike on May 26, 1953 at the Frontier Linen Supply, Inc., Buffalo, New York, also a member of the Linen and

Credit Exchange, the bargaining representative for all of its employer members.

Is that stipulation agreeable to the Respondents?

Mr. Borins: It is, sir.

16 Trial Examiner Downing: To the Charging Party?

Mr. Wells: Yes, sir.

Trial Examiner Downing: That stipulation will be received.

• • • • •

Mr. Cavers: Frontier Linen Supply, Inc., Buffalo, New York and Respondents Buffalo Linen, Famous, Buffalo General, Modern, Morgan, Office Towel and Walkers have for the past 13 years been members of Respondent Linen and Credit Exchange (Unincorporated). During this time Respondents and Frontier Linen Supply, Inc., have recognized Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL as the exclusive bargaining representative of all their employees employed as truck drivers, and have had successive collective bargaining agreements with Local No. 449 covering wages, hours and other terms and conditions of employment of the truck drivers.

These collective bargaining agreements have been arrived at through negotiations conducted between representatives of the Linen and Credit Exchange, acting on behalf of all its members, including Respondents and Frontier Linen Supply, Inc., and representatives of Local 449 acting for the truck drivers.

Whenever a proposed collective bargaining agreement was agreed upon it was submitted for majority approval to the membership of the Linen and Credit Exchange and Local 449. After a majority of the membership of the Linen and Credit Exchange and Local 449 approved a collective bargaining agreement, that agreement was signed by each member of the Linen and Credit

17 Exchange and by the Secretary-Treasurer and Business Agent for Local 449 and conformed copies were given all signers.

On April 30, 1952 the Linen and Credit Exchange and Local 449 on behalf of their respective members executed a collective bargaining agreement covering the wages, hours

and other terms and conditions of employment of the truck drivers employed by the members of the Exchange. This agreement, by its terms, provided that it shall continue in full force and effect to midnight of the 30th day of April, 1953, and shall continue from year to year thereafter, unless a 60-day written notice of a desire to change shall be given either by the Employer or the Union before the first or any subsequent expiration date. 60 days prior to the first expiration date Local 449 served the required notice of a desire to change the agreement. Negotiations for a new agreement began some time in March of 1953 between Linen and Credit Exchange acting on behalf of its members and Local 449 acting on behalf of its member truck drivers.

Is that stipulation agreeable to the Respondents?

Mr. Borins: Yes, sir.

Mr. Cavers: And to the Charging Party?

Mr. Wells: Yes, sir.

• • • • •

Mr. Cavers: I would like to make a further statement to which I think the Respondents and the Charging Party may also stipulate. The stipulation which we have just read into the record, Mr. Examiner, states that the negotiations between the Linen and Credit Exchange on behalf of its employer members and Local 449 on behalf of
18 the truck driver employees of the members of the Exchange began in March of 1953.

These negotiations continued off and on until May the 26th of 1953 at which time Local 449 called its members who were employed as truck drivers for the Frontier Linen Supply, Inc. on strike and established a picket line on that day at Frontier Linen Supply only. That same night, May the 26th, the Linen and Credit Exchange and Local 449 had a meeting and during this meeting and at one or two subsequent meetings the Respondents told Local 449 representatives that the employees of the Respondents were locked out because of the strike at the Frontier Linen Supply, Inc., and that if Local 449 would withdraw its picket line and cease the strike at Frontier Linen Supply, Inc. they would permit the employees of the Respondents to return to work.

Is that stipulation agreeable to you, Mr. Borins?

Mr. Borins: I am not quite clear, Mr. Examiner, as to whether that stipulation was made only on the first day of the strike or on subsequent days. I wasn't present the first day of the strike, but I was at all bargaining sessions after that and I don't recall of such concessions being made, do you?

Mr. Wells: It was made on the first meeting, on the 26th, definitely.

Mr. Borins: Yes, I agree to that.

Mr. Wells: Yes, it was made at a later date in the office of Morgan Linen Supply in Buffalo and also to one of the drivers employed by Morgan, not in my presence—the steward, in fact, had been told by the management of the Morgan Linen Supply Company; also it was told to myself by Mr. Vanini.

19 Mr. Borins: May I interrupt at that point.

Trial Examiner Downing: Just a moment.

Mr. Borins: May I interrupt at that point. I just raised the question. I knew it was made the first day. That was in the statement made by Mr. Cavers. Whether it was made subsequent I say I don't know. If Mr. Wells says it was it is all right with me. You don't have to particularize.

Mr. Wells: Well, that is Modern Linen Supply, Mr. Examiner——

Trial Examiner Downing: As I understand it this colloquy is for the purpose of straightening out the stipulation?

Mr. Borins: That is right.

Trial Examiner Downing: Now, in light of the colloquy, Mr. Borins, are you willing to stipulate, or to accept the stipulation as originally stated by Mr. Cavers?

Mr. Borins: Yes, I am, sir.

Trial Examiner Downing: Is that acceptable to you, sir?

Mr. Wells: Yes, sir.

Trial Examiner Downing: The stipulation will be received.

Mr. Borins: Mr. Cavers, would you add to that stipulation the fact that Frontier was also a member of Linen and Credit Exchange, had not been bargaining independently, but had been bargaining through Linen and Credit Exchange? I want to be very clear on that. I am not sure whether the Trial Examiner is or not.

Trial Examiner Downing: I thought that was included,

but if not with agreement of counsel Mr. Borins' statement will be accepted as a further stipulation.

20 Mr. Cavers: Yes, it will be agreeable to the counsel for the General Counsel.

Mr. Wells: It will, yes.

Trial Examiner Downing: All right, sir.

Mr. Cavers: On June the 3rd, 1953 the Linen and Credit Exchange and Truck Drivers Local 449 reached an agreement for a new contract. Local 449 thereupon withdrew its pickets from the Frontier Linen Supply, Inc. and terminated its strike, whereupon, the Respondents——

Mr. Borins: May I suggest that all members of the Linen and Credit Exchange went back to work——

Mr. Cavers: Employees of the Respondents went back to work. Is that stipulation also agreeable?

Mr. Borins: Yes.

Mr. Cavers: To the Charging Party?

Mr. Wells: Yes.

Mr. Borins: It is Respondents and Frontier.

Mr. Cavers: Yes.

Mr. Borins: Mr. Examiner, Frontier is not a party here.

Trial Examiner Downing: I understand. The stipulation will be received.

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Mr. Borins: I would like to offer this statement as a stipulation that with the expiration of the contract between the members of the Linen and Credit Exchange in 1949 Local 449 caused a strike to be called at all members of the Exchange which strike continued one day, but on completion of the contract in 1949 all of the employees returned to work. What I am trying to point out, Mr. Examiner, is that there was a strike at all members in 1949. That

21 might be received as an addition to the other stipulation.

Mr. Cavers: That stipulation is agreeable to the General Counsel, Mr. Examiner.

Trial Examiner Downing: To the Union?

Mr. Wells: Yes, sir.

Trial Examiner Downing: It will be received.

Mr. Borins: Respondent has nothing further to present.

Trial Examiner Downing: That concludes the evidence then, I take it, gentlemen?

Mr. Cavers: That is correct, Mr. Examiner.

Trial Examiner Downing: All of the facts have been stipulated. Do you wish to argue the case orally?

Mr. Borins: Mr. General Counsel, I will waive it if the General Counsel does.

Mr. Cavers: The General Counsel will waive oral argument, Mr. Examiner, unless you would like oral argument.

Trial Examiner Downing: Well, I think before I would be prepared to actually get any benefit out of oral argument I would like to see these stipulations written up which would mean delaying oral argument until some time later this afternoon. I doubt if oral argument would be of much benefit prior to seeing the stipulations in writing.

Mr. Borins: Mr. Examiner, the reason I am waiving argument, very frankly I just don't know what to say. There is no dispute here as to the facts. I submit, Mr. Examiner, which is the law involved in this case. The merits——

Trial Examiner Downing: Yes, but you are in a field in which there is considerable controversy at the moment; the Davis Furniture Case and Morand case——

Mr. Borins: Yes, sir. I don't want to participate in any coin flip, Mr. Examiner, at this moment.

22 Trial Examiner Downing: I don't understand.

Mr. Borins: Well, simply this, that there is considerable dispute as to what the law of the land is at the moment. I just don't want to get into that dispute. We feel that we are right in our position. The Union feels that we are wrong. The Board has made a charge here; this case needs a decision. I don't know that oral argument would present anything.

Trial Examiner Downing: Do you care to answer this question—under the——

Mr. Borins: May we go off the record on this?

Trial Examiner Downing: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Downing: On the record. I take it then that you gentlemen don't care to argue at the present time, and as I understand it, Mr. Reporter, you will not be able to type this record any time soon. Then do you waive oral argument, gentlemen?

Mr. Borins: Respondents do, sir.

Mr. Cavers: General Counsel will also waive.
Mr. Wells: Yes, sir.

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BEFORE NATIONAL LABOR RELATIONS BOARD

Intermediate Report and Recommended Order
Nov. 10, 1953

STATEMENT OF THE CASE

This proceeding, brought under Section 10 (b) of the National Labor Relations Act as amended (61 Stat. 136), was heard in Buffalo, New York, on September 8, 1953, pursuant to due notice. The complaint, issued on July 2,
23 1953, by the General Counsel of the National Labor Relations Board [1] and based on charges duly filed and served, alleged in substance that Respondents had engaged in unfair labor practice proscribed by Section 8 (a) (3) and (1) of the Act, by laying off the employees whose names are listed in Appendix A hereto from on or about May 27, 1953 to June 3, 1953, because of their union membership or their participation in union or other concerted activities. Respondents, answering through Linen and Credit Exchange denied the commission of unfair labor practices as alleged.

All parties were represented at the hearing by counsel or by representatives and were afforded full opportunity to participate in the hearing and to file briefs and proposed findings of fact and conclusions of law. No evidence was offered by any party; the facts summarized below are established either by admissions in Respondents' answer or by stipulation of the parties at the hearing. Respondents have filed a brief.

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[1] The General Counsel and his representative at the hearing are referred to herein as the General Counsel and the National Labor Relations Board as the Board. The above-named Respondents are referred to herein as Respondents and the charging Union as the Union. The summary of the pleadings made herein includes amendments made at the hearing.

Upon the entire record in the case the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondents

The seven linen supply companies named in the caption hereto are New York corporations, which, together with Frontier Linen Supply, Inc., of Buffalo, comprise the membership of the Respondent Linen and Credit Exchange, which is, in turn, a voluntary unincorporated association of employers who are engaged in furnishing, supplying, and servicing industrial and commercial enterprises with cotton and linen towels, uniforms, and related items. Each of the corporate Respondents is engaged in the linen supply business as described, and each operates one or more plants either in Buffalo, Dunkirk, or Niagara Falls, New York. Jurisdictional allegations of the complaint, admitted by the answer, establish that each corporate Respondent is engaged in commerce within the Board's current jurisdictional standards through the volume of their extrastate purchases of materials and supplies and their services rendered to industrial and commercial concerns which annually ship goods and merchandise valued in excess of $25,000 outside the State of New York. In the aggregate, members of the Exchange purchased, in 1952, materials and supplied valued in excess of $2,000,000, of which more than 80 percent were from extrastate sources, and in the same year they rendered services in excess of $4,000,000, of which more than 20 percent were to industrial and commercial concerns as aforesaid.

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The corporate Respondents have been members of the Exchange for some 13 years. One of the purposes of the Exchange is to obtain uniformity and stability in labor relations between its members and the various labor organizations representing employees of its members; and its activities include the conducting of labor negotiations and the execution of labor contracts on behalf of all its members with unions representing employees of members.

Respondents are engaged in interstate commerce within the meaning of the Act.

II. The Labor Organization Involved

The Union is a labor organization which admits to membership employees of Respondents other than the
25 Exchange.

III. The Unfair Labor Practices

A. *Summary of Stipulated Facts*

Respondents admitted that they laid off the employees on May 27, 1953, as charged in the complaint, and did not reinstate them until June 3, 1953. Respondents denied that the layoff was because of the union membership or union or other concerted activities of the employees, but stipulated that the employees were laid off because the Union, as their bargaining representative, had engaged in a strike on May 26, 1953, at the Frontier Linen Supply Inc., a member of the Exchange, which was the bargaining representative of all its members. Frontier had not engaged independently in bargaining negotiations with the Union.

During the 13 years for which Frontier and the 7 corporate Respondents have been members of the Exchange, said Respondents and Frontier have recognized the Union as the exclusive bargaining representative of all their employees employed as truck drivers and have had successive collective bargaining agreements with Local No. 449, covering the wages, hours, and other terms and conditions of employment of the truck drivers, which agreements have been arrived at through negotiations conducted between representatives of the Exchange, acting on behalf of all its members, and representatives of the Union, acting for the truck drivers.

Whenever a proposed collective bargaining agreement was agreed upon, it was submitted for majority approval to the membership of the Exchange and the Union. After a majority of the membership of the Exchange and the Union approved such an agreement, it was signed by
26 each member of the Exchange and by the secretary-treasurer and business agent for the Union, and conformed copies were given all signers.

At the expiration of the contract between the Union and

the members of the Exchange in 1949, the Union had caused a strike to be called at all members of the Exchange, which strike lasted 1 day, but on completion of the contract in 1949, all of the employees returned to work.

On April 30, 1952, the Exchange and the Union, on behalf of their respective members, executed a collective bargaining agreement covering the wages, hours, and other terms and conditions of employment of the truck drivers employed by the members of the Exchange. This agreement by its terms provided that it should continue in full force and effect to midnight of April 30, 1953, and should continue from year to year thereafter unless a 60-day written notice of a desire to change should be given either by the employer or the Union before the first or any subsequent expiration date. Sixty days prior to the first expiration date, the Union served the required notice of a desire to change the agreement.

Negotiations for a new agreement began sometime in March of 1953 between the Exchange, acting on behalf of its members, and the Union, acting on behalf of its member truck drivers. Those negotiations continued off and on until May 26, at which time the Union called on strike its members who were employed as truck drivers for Frontier, and established a picket line on that day at Frontier only. On the night of May 26, the Exchange and the Union had a meeting, and during that meeting and one or two subsequent meetings, the Respondents informed the union representatives that the employees of the Respond-
27 ents were locked out because of the strike at Frontier, and that if the Union would withdraw its picket line and cease the strike at Frontier they would permit the employees of Respondents to return to work.

On June 3, the Exchange and the Union reached an agreement for a new contract. The Union thereupon withdrew its pickets from Frontier and terminated the strike, whereupon the employees of the Respondents went back to work.

B. *Concluding Findings*

The stipulated facts which the parties have chosen to submit present, largely in a vacuum, a case which resembles skeletally the muchly litigated *Morand* and *Davis*

cases,[2] *i.e.*, multiemployer bargaining with the Union through an employer association; a strike by the Union against one member of the association; a lockout and a layoff of employees by the other members. Yet, because of the absence of detail and the silence of the stipulation as to facts which were accorded great, if not crucial, significance at various stages of the *Davis-Morand* litigation, the present determination must turn largely on the negative, rather than on the positive, aspects of the stipulation.

Certainly, it can be said that under the rationale of the Board's decisions in the *Morand* and *Davis* cases[3]
28 (followed in the later case of *Continental Baking Co.*, 104 NLRB No. 9), Respondent's conduct was unquestionably unlawful, since it constituted reprisal against the employees because the Union, as their bargaining representative, had engaged in a lawful strike against Frontier. Thus, in the absence of evidence that strikes against other members were threatened or anticipated, that Respondents were unable to operate without assurances against being struck, that Respondents had sought and had failed to obtain such assurances, or, alternatively, assurances of adequate notice for the arrangement of their operations, it cannot be found that the lockout was defensive in nature. Stated differently, there was no showing that there were any economic considerations which justified the lockout, and none that the Respondents' motive was in fact the protection of their economic interests. Cf. *Betts-Cadillac-Olds, Inc.*, 96 NLRB 268; *International Shoe Com-*

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[2] *Morand Brothers Beverage Co.*, 91 NLRB 409; 190 F. 2d 576 (C.A. 7); 99 NLRB 1448 (on remand); 204 F. 2d 529 (C.A. 7). *Leonard et al., d/b/a Davis Furniture Co.*, 94 NLRB 279; 197 F. 2d 435 (C.A. 9); 100 NLRB 1016 (on remand); 205 F. 2d 355 (C.A. 9).

[3] The Board's views were fully explicated in those decisions, which have received widespread comment and analysis in numerous law review articles. See, *e.g.*, *Legality of the Lockout*, Koretz, Robert F., Syracuse Law Review, Spring 1953, pp. 251-273. The conclusions reached herein render unnecessary either further analysis of the Board's views or exploration of the realm of the Courts' disagreement therewith.

pany, 93 NLRB 159; *Duluth Bottling Association,* 48 NLRB 1335.

Attention is turned, then, to the question whether the Courts' decisions would dictate a different result.[4] But here, again, the stipulated facts differ so widely that it is unnecessary to speculate on the ultimate impact which those decisions may have on the Board's views as formerly expressed. Thus, present in either or both of those cases, but absent here so far as the record shows, were the following facts which were emphasized by the Courts as impelling their conclusions:

An impasse had been reached; negotiations had collapsed; the employers had exhausted the possibilities of good faith bargaining. The object of the strike in each case was to force capitulation of the struck-employer
29 to the Union's demands as made during the bargaining negotiations with the association.

In *Morand,* the Union had approved a *general* strike authorization, news of which quickly reached the employers. After the strike was called against one, the other employers notified the Union they could not operate under the threat of a strike.

In *Davis* employees of all the employers had joined in voting to call the strike, the Union had authorized its strike manager to strike successively against each employer, and the first strike was announced as the beginning of a "whipsawing" process against one after another of the remaining employers. The effects of the "whipsawing" process (*e.g.,* loss of customers and good will) were held to justify the lockout and layoff in protection of the employers' economic interests.

Since the Courts' disagreement with the Board stemmed from facts not here shown to be present, the Board's decisions—which here stand as *a fortiori* authority—remain as conclusive precedents.

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[4] In *Morand,* the Court ultimately sustained the Board's finding that the employers had unlawfully *discharged* their employees, though it expressed sharp disagreement with the Board's alternative finding that, viewed as effectuating only a layoff, the lockout was also unlawful. (204 F. 2d 529)

It is, therefore, concluded and found that by laying off the employees whose names are listed in Appendix A hereof, from May 27 to June 3, 1953, inclusive, Respondents discriminated against them to discourage participation in union or other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and thereby committed an unfair labor practice proscribed by Section 8 (a) (3) and (1).

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

30 CONCLUSIONS OF LAW

1. Respondents' activities set forth in Section III above, occurring in connection with Respondents' operations described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. By laying off the respective employees whose names are listed in Appendix A, hereof, from May 27 to June 3, 1953, inclusive, Respondents, respectively, discriminated in regard to their hire and tenure of employment to discourage membership in the Union, and thereby engaged in an unfair labor practice proscribed by Section 8 (a) (3) and (1) of the Act, and affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in an unfair labor practice, it will be recommended that they cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

RECOMMENDATIONS

Upon the basis of the above findings and conclusions, it is recommended that Respondents, their officers, agents, successors, and assigns, shall:

1. Cease and desist from discouraging membership in the Union, or in any other labor organization of their
31 employees, by laying them off or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

2. Take the following affirmative action:

(a) Make whole, respectively, each of the employees whose names are listed in Appendix A hereto, for any loss of pay he may have suffered by payment to him of a sum of money equal to that which he normally would have earned from May 27 to June 3, 1953, inclusive, less his net earnings during said period (*Crossett Lumber Company*, 8 NLRB 440, 497-8);

(b) Post in their respective plants copies of the notice attached hereto and marked Appendix B. Copies of said notice to be furnished by the Regional Director for the Third Region shall, after being signed by Respondents' representatives, be posted by Respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material; and

(c) Notify the Regional Director for the Third Region, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, what steps Respondents have taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, Respond-
32 ents notify said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondents to take the action aforesaid.

Dated at Washington, D. C., this day of November 1953.

GEORGE A. DOWNING,
Trial Examiner.

33 APPENDIX A TO INTERMEDIATE REPORT AND RECOMMENDED ORDER

Listed below under the names of the respective Respondents are the names of the employees who were laid off by said Respondents on May 27 and reinstated on June 3, 1953.

Buffalo Linen Supply Company and Linen and Credit Exchange

Joseph Homer
Joseph Gerace

Famous Linen Supply Co., Inc., and Linen and Credit Exchange

Philip Trifiro
Carl Maiorana
Sam Scibetta
Al Scibetta
Hank Legatzke
Norm Axford
Don Herberger
John Feraci

Buffalo General Laundries Corp. (Merchants Linen Supply Division) and Linen and Credit Exchange

James Chambers
Robert Thompson
John H. Monaco
Ray Butler
James J. Finnerty
Ken Beiter
Charles Redanz
Edward Johnson
William Mullane

Modern Linen Supply Company and Linen and Credit Exchange

Charles Scibetta
Francis Gigante
Robert Pabeljack

Morgan Linen Supply, Inc., and, Linen and Credit Exchange

Matty Comell
Joe Zarcone
Ed Kinney
George Meisenburg
John Calabro
Dominic Guericio
Ed Wojciak
Carmen Mambrino
Angelo Abrams
Mike De Angelo

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Charles Sanfilippo	Leonard Pinkowski
Tony Muecio	Leonard Kuzora
John Balcerzak	James Maggio
Sam Greco	Richard Kalfas
Emil Guglielmo	Donald Dugan
Louis Butkowski	Joe Verone

Charles Seward

The Office Towel Supply Company, Incorporated, and Linen and Credit Exchange

Earl Wagner	John Christiano
J. Dix	Angelo Gerace
Leonard Slawiak	Pascal Ipolito
Harry Thorpe	Wilfred Monette
Gordon Ford	James Irwin
Bill Bailey	Sylvester Eich
John MacGregor	Eugene Monette
Howard Walmuth	James Shufelt

Henry Kujawa

Walkers Laundry and Linen Supply and Linen and Credit Exchange

Felice Ruggiero	Paul Pascuzzi
Ted Colaty	Harry Pitcher

The Office Towel Supply Co., Inc., and *Linen and Credit Exchange:*

Earl Wagner	John Christiano
J. Dix	Angelo Gerace
Leonard Slawiak	Pascal Ipolito
Harry Thorpe	Wilfred Monette
Gordon Ford	James Irwin
Bill Bailey	Sylvester Eich
John MacGregor	Eugene Monette
Howard Walmuth	James Shufelt

Henry Kujawa

35 *Walkers Loundry and Linen Supply* and *Credit Exchange:*

Felice Ruggiero	Paul Pascuzzi
Ted Colaty	Harry Pitcher

All of our employees are free to become or refrain from becoming members of the above-named Union or any other labor organization.

BUFFALO LINEN SUPPLY CO.

By .....
(Representative) (Title)

FAMOUS LINEN SUPPLY CO. INC.

By .....
(Representative) (Title)

BUFFALO GENERAL LAUNDRIES CORP.

By .....
(Representative) (Title)

MODERN LINEN SUPPLY COMPANY

By .....
(Representative) (Title)

MORGAN LINEN SUPPLY, INC.

By .....
(Representative) (Title)

THE OFFICE TOWEL SUPPLY COMPANY, INCORPORATED

By .....
(Representative) (Title)

WALKERS LAUNDRY AND LINEN SUPPLY

By .....
(Representative) (Title)

LINEN AND CREDIT EXCHANGE

By .....
(Representative) (Title)

Dated: .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

36 APPENDIX B TO INTERMEDIATE REPORT AND RECOMMENDED ORDER

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, or in any other organization of our employees, by laying them off, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL, respectively, make whole the employees, whose names are listed below, for any loss of pay they may have suffered as a result of our discrimination against them.

Buffalo Linen Supply Company and Linen and Credit Exchange:

Joseph Homer
Joseph Gerace

Famous Linen Supply Co., Inc., and *Linen and Credit Exchange:*

Philip Trifiro
Carl Maiorana
Sam Scibetta
Al Scibetta
Hank Legatzke
Norm Axford
Dan Herberger
John Feraci

37 *Buffalo General Laundries Corp.* and *Linen and Credit Exchange:*

James Chambers
Robert Thompson
John H. Monaco
Ray Butler
James J. Finnerty
Ken Beiter
Charles Redanz
Edward Johnson
William Mullane

Modern Linen Supply Co. and *Linen and Credit Exchange:*

Charles Scibetta Francis Gigante
Robert Pabeljack

Morgan Linen Supply, Inc. and *Linen and Credit Exchange:*

Matty Comell	Dominic Guericio
Joe Zarcone	Ed Wojciak
Ed Kinney	Carmen Mambrino
George Meisenburg	Angelo Abrams
John Calabro	Mike De Angelo
Charles Sanfilippo	Leonard Pinkowski
Tony Muecio	Leonard Kuzora
John Balcerzak	James Maggio
Sam Greco	Richard Kalfas
Emil Guglielmo	Donald Dugan
Louis Butkowski	Joe Verone

Charles Seward

38 ERRATUM—November 12, 1953

The word *states* is hereby corrected to *stages* in line 55, page 3, of the Intermediate Report in the above case.

GEORGE A. DOWLING,
Trial Examiner.

Dated: November 12, 1953.

Before National Labor Relations Board

Decision and Order—July 26, 1954

On November 10, 1953, Trial Examiner George A. Downing issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in certain unfair labor practices, and recommended that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report together with a supporting brief. The Respondents also requested oral argument. The request is hereby denied, because the record, the excep-

tions, and the briefs, adequately present the issues and positions of the parties.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondents' exceptions and brief, and the entire record in this case, and hereby adopts the findings and conclu-
39 sions of the Trial Examiner only to the extent that they are consistent with this Decision and Order.

The Respondent-employers, together with Frontier Linen Supply, Inc., are members of the Respondent-association, Linen and Credit Exchange (hereinafter called the Association). Pursuant to collective bargaining on a multi-employer basis for approximately 13 years, the Respondents and the Union have been parties to successive collective bargaining agreements [1] covering the truck driver employees of the respective Employers. Prior to the expiration of the contract, containing an automatic renewal clause, which was to expire on April 30, 1953, the Union notified the Respondents of its desire to open negotiations to change the agreement. Thereafter, the parties negotiated unsuccessfully for a new contract, and, on May 26, 1953, the truck drivers employed by one member of the Association, Frontier, went on strike and picketed Frontier's plant. On May 27, the remaining Association members laid off their truck drivers after advising the Union that the layoff action was the result of the strike of Frontier's plant and that the employees would be recalled if the Union withdrew its picket line and ended the strike at Frontier. In the meanwhile, the parties continued their bargaining negotia-

[1] Negotiations on these contracts were conducted between representatives of the Association, acting on behalf of all its Employer-members, and representatives of the Union. After agreement by the respective representatives on a proposed bargaining contract, the proposal was submitted for approval to the members of the Association and the Union. Upon approval of the proposed agreement by the individual members of the Association and the Union, the agreement was signed by each Employer-member of the Association and by officials of the Union.

tions, and, on June 3, the Union and the Association executed a new contract, respectively terminated the strike and the lockout, and the truck drivers of the various Employers returned to work.

40 As pointed out by the Trial Examiner, the foregoing facts, mainly stipulated, present the case "largely in a vacuum." From these facts, and in the *absence* of specific evidence showing that the strike was likely to spread to the nonstruck Employers, the Trial Examiner, by reliance upon certain prior Board decisions, inferred that the Employers who were not struck engaged in unlawful retaliatory conduct. However, in these circumstances, we think the more reasonable inference is that, although not specifically announced by the Union, the strike against the one employer necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association. For, the Union's action represents a similar technique of exerting economic pressure to atomize the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship. The calculated purpose of maintaining a strike against one employer and threatening to strike others in the employer group at future times is to cause successive and individual employer capitulations. Therefore, and in the absence of any independent evidence of antiunion motivation, we find that the Respondent's action in shutting their plants until termination of the strike at Frontier was defensive and privileged in nature, rather than retaliatory and unlawful.[2]

Contrary to the assertion of our dissenting colleague, our decision herein does not establish that the employer lockout is the corollary of the employees' statutory

41 right to strike. Upon the facts of this case, we find it unnecessary to pass upon that issue. We have done no more in this case than affirm the legal concept enunciated

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[2] See: *Leonard, et al. d/b/a Davis Furniture Company, et al.*, v. *N. L. R. B.*, 205 F. 2d 355 (C. A. 9), wherein the Court stated, ". . . the right of the employers to lock out temporarily all the employees is no more than equal to the right of the union of all the employees to call out the employees of one after another of the [employers] in the whipsawing manner above described."

by the Ninth Circuit Court of Appeals in the *Davis Furniture* case, which provides that a strike by employees against one employer-member of a multi-employer bargaining unit constitutes a threat of strike action against the other employers, which threat, *per se*, constitutes the type of economic or operative problem at the plants of the nonstruck employers which legally justifies their resort to a temporary lockout of employees.[3]

Accordingly, we find that the General Counsel has failed to show that the Respondents' temporary cessation of operations constituted an unfair labor practice and we shall, therefore, dismiss the complaint in its entirety.

ORDER.

IT IS HEREBY ORDERED that the complaint in this case be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C., July 26, 1954.

GUY FARMER, *Chairman.*
IVAR H. PETERSON, *Member.*
PHILIP RAY RODGERS, *Member.*
ALBERT C. BEESON, *Member.*
NATIONAL LABOR RELATIONS BOARD

42 ABE MURDOCK, Member, dissenting:

In this case for the first time in the history of the National Labor Relations Act and its amendments a majority of this Board is holding that the mere threat of a strike justifies discrimination against employees to discourage them from engaging in concerted activities for their mutual aid and protection.[4] Not only is this legal conclusion

[3] *Ibid*, wherein the Court also stated, ". . . the whipsawing threatened the loss of customers and a cessation of the [employers'] market."

[4] Section 7 of the Act, as amended, provides that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8 (a) (1) of the Act makes it an unfair labor practice for an employer

unprecedented, but the stipulated facts reveal no basis for the inference that it was the threat of a possible strike at the plants of the Respondent employers which caused them as a defensive measure to lockout their employees. Indeed, that stipulation states the purpose of the lockout in the clearest language. According to the stipulation, the Union was informed by the Respondents "that the employees of the Respondents were locked out because of the strike at Frontier Linen Supply, Inc., and that if Local 449 would withdraw its picket line and cease the strike at Frontier Linen Supply, Inc., they would permit the employees of the Respondents to return to work." On these facts the conclusion is inescapable to me that the Respondent employers, members of a multi-employer association, locked out their employees for the purpose of breaking a strike at the single plant of an employer associated with them in collective bargaining.

I think this is a most obvious example of conduct violative of Sections 8 (a) (3) and (1) of the Act. Contrary to the majority's statement, the Respondents' unlawful
43 retaliatory conduct was not "inferred" by the Trial Examiner. He accepted the facts as stipulated and, finding no facts in the record to warrant the conclusion that the lockout was economically justified, held on the basis of all precedents that the lockout was discrimination within the meaning of these sections of the Act. The majority suggests that it was incumbent on the General Counsel to produce additional evidence, independent of the stipulated purpose of the lockout set forth above, to prove antiunion motivation. In other words, having produced evidence revealing a *prima facie* case of discrimination to discourage union activity, the General Counsel, according to the majority, should have produced more evidence to show that the Respondents *really* intended to do what they did. Typically, evidence of antiunion motivation is necessary in those

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"To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." Section 8 (a) (3) of the Act makes it an unfair labor practice for an employer "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

cases where the allegation of unlawful discrimination is countered by the defense that the discrimination was for cause rather than union activity. Where, as here, the admitted facts reveal that the discrimination resulted *solely* from concerted activity protected under Sections 7 and 13 of the Act, evidence of the Respondents' general bias against the Union is wholly unnecessary. Indeed, the Supreme Court of the United States has held that where encouragement or discouragement of union activity can reasonably be inferred from the nature of the discrimination specific proof of intent is unnecessary.[5] This rule of evidence is, as the court found, "but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct."

44 It is true the Board and the courts have held that certain lockouts are permissible where the record is clear that it was not economically feasible for the Respondent to keep its doors open under the threat of an immediate strike. Thus, in *Betts Cadillac Olds, Inc.*,[6] a group of automobile dealers were fearful that if they accepted automobile repair jobs they could not, under the threat of strike, assure their customers that the work would be done expeditiously. The Board affirmed the Trial Examiner's finding that the lockout in anticipation of the strike was justified. Similarly, a lockout to prevent spoilage of materials,[7] or one induced by the operative difficulties of running a plant where the union struck one of three integrated departments[8] has been held lawful. The issue was litigated at length, if inconclusively, in the *Morand Bros. Beverage*[9] and *Davis Furniture* cases.[10] In those cases the Board fully explicated its view that the lockout, unlike the strike, which

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[5] *Gaynor News Co. v. N.L.R.B.*, 347 U. S. 17.

[6] 96 NLRB 268.

[7] *Duluth Bottling Association*, 48 NLRB 1335.

[8] *International Shoe Company*, 93 NLRB 907.

[9] 91 NLRB 409; on remand, 99 NLRB 1448; 190 F. 2d 576 (C.A. 7), enforcing in part and remanding; 204 F. 2d 529 (C.A. 7), enforcing.

[10] 94 NLRB 279; on remand, 100 NLRB 1016, 197 F. 2d 435 (C. A. 9), remanding; 205 F. 2d 355 (C.A. 9), enforcement denied.

is a specific guaranteed right under Sections 7 and 13 of the Act, is not a lawful exercise of the employer's economic power unless, as in the *Betts Cadillac* and other cases, there are special business reasons making it impractical or impossible for the employer to continue operations. In the *Morand* case, the court affirmed the Board's finding of a violation of Sections 8 (a) (3) and (1). It added *dicta,* however, to the effect that a lockout of a temporary nature in anticipation of a threatened strike after an impasse in bargaining had been reached was in the category of defensive action on the part of an employer. In
45 the *Davis Furniture* case the court refused to enforce the Board's decision that the temporary lockout was violative of Sections 8 (a) (3) and (1), reversing, in effect, the Board's finding that the lockout was not necessitated by business reasons. The court held that the lockout was the result of the Union's announced whipsawing process, that the employers could not accept or give orders for furniture under the threat of a strike against all of the dealers in the multi-employer association. I deemed this question of such importance that I urged my colleagues on the Board to request the Supreme Court of the United States to take *certiorari* in this case, hoping that this high tribunal would settle the broad and important issue of whether the lockout, despite the express language of Sections 8 (a) (3) and 8 (a) (1) of the Act, was nothing more than the corollary of the Union's right to strike. A majority of the Board, however, declined to request *certiorari.*

In the *Morand* and *Davis Furniture* cases both courts referred to previous decisions of the Board, cited above, and indicated that their views were in conformance with the business necessity rule of the Board cases. It seems to me that if the language of Sections 8 (a) (3) and 8 (a) (1) of the Act, forbidding discrimination against or interference with union activities, has any meaning no lockout can be justified unless the employer produces at least some evidence that it was for cause. In the absence of such evidence, as in the instant case I can reach no other conclusion under the express language of the Statute than that the Respondents have violated Sections 8(a)(3) and 8(a)(1) of the Act. Certainly, the defensive nature of the lockout is not supported, as the majority asserts in this case,
46 by the absence of independent evidence of anti-union motivation. Nor does it help to pile inference o

inference, as the majority does here, to infer that the Respondents were faced with an actual threat of a strike simply because the Union struck one member of the Association and, on the basis of this inference, to make the further inference that the lockout resulted from the implied threat. In my opinion, such inferences are no substitute for actual evidence that the lockout was for cause. Moreover, as indicated above, any such inference is contrary to the stipulation of the parties, which reveals that the purpose of the lockout in this case was entirely offensve rather than defensive in nature.

I believe the Board was right in the *Morand* and *Davis Furniture* cases, which the majority is apparently reversing here. But even those ameliorating economic circumstances which might be said to justify a lockout in those cases are, as the Trial Examiner correctly found, absent here. There was no impasse in good faith collective bargaining here; that was no general strike authorization; there was no announcement by the Union that its strike against Frontier Linen Supply Co. was the first of planned successive strikes against each employer in the Association. To hold, as the majority does in the instant case, that a group of employers can lawfully lockout their employees solely because of a strike at the plant of another employer associated with them in collective bargaining increases to that extent the sore area of industrial conflict and impediments to interstate commerce which it is the express policy of this Act to minimize and decrease. Under the majority's decision, it now appears to be within the power of an employer to virtually nullify Sections 7 and 13 of the Act by the simple expedient of joining a multi-employer association.

47 But Congress has charged this Board with the duty of preserving the right of employees to engage in concerted activities for their mutual aid and protection. I would not lightly defeat that right. Certainly, I would not create out of cumulative inferences a defense to an invasion of rights specifically guaranteed in this Act. I would not find that this lockout was "defensive and privileged" when there is not the slightest evidence in the record before me that the Respondents were concerned about economic or operative problems in their own plants. If, indeed, an employer should have the right to use a lockout as the Re-

spondents have in this case on the theory that it is the corollary to the employees' right to strike, it seems to me that is something for Congress and not this Board to decide. The Statute, as I read it, now forbids such discrimination, and I would enforce it as it is written.

Dated, Washington, D. C., July 26, 1954.

ABE MURDOCK, *Member.*
NATIONAL LABOR RELATIONS BOARD

48 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 86—October Term, 1955

Docket No. 23424

TRUCK DRIVERS LOCAL UNION No. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OPINION FILED—FEBRUARY 14, 1956

Before:

CLARK, FRANK and WATERMAN,
Circuit Judges.

Petition to review and set aside an order of the National Labor Relations Board. GRANTED.

MCMAHON & CROTTY (Buffalo, New York), *for petitioner.*

THEOPHIL C. KAMMHOLZ, DAVID P. FINDLING, MARCEL MALLET-PREVOST, NORTON J. COME and DUANE B. BEESON, *for National Labor Relations Board.*

49 FRANK, *Circuit Judge:*

Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, A. F. of L. (hereinafter referred to as the Union) seeks review under § 10 of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. § 151 *et seq.*) (hereinafter referred to as the Act) of an order of the National Labor Relations Board, dismissing an unfair-labor-practices complaint in which it is the charging party. The Union asks that the order of the Board be set aside. The decision of the Board is reported at 109 N. L. R. B. 447.

The case was tried on an agreed state of facts which are substantially as follows:

The Union represents all the truck-driver employees of the members of the Linen and Credit Exchange (hereinafter called the Exchange), an employer association representing eight employers in collective bargaining negotiations with the Union. However, it does not appear from the stipulated facts that the Union has been certified by the Board as bargaining agent for the association-wide unit. The terms of the agreements were worked out by the representatives of Exchange and the Union, and then submitted to the membership of Exchange and the Union for majority approval. When majority approval was given, the agreement was signed by each member of Exchange and by the Union. This had been the practice for the thirteen years preceding this controversy.

Sixty days before April 30, 1953, when the contract (which contained an automatic renewal clause requiring notice of a desire to change the contract to be given sixty days before the expiration date) was to expire, the Union notified Exchange of its desire to open negotiations to change the agreement. In March, 1953, negotiations were begun for a new collective bargaining agreement. Meetings were held during the succeeding weeks but no agreement was reached. On May 26, 1953, the truck-driver employees of Frontier Linen Supply, Inc., a member of Exchange, went on strike, but the employees of the other seven members remained on the job.

On the evening that the strike against Frontier began, Exchange notified the Union that the other members were laying off all their truck-driver employees until the strike at Frontier was ended. A lockout by these seven members of Exchange followed; at the succeeding negotiations, the

Union was told that the employees of all such members would be recalled to work if the picket-line at Frontier were withdrawn and the strike terminated.

On June 3, 1953, agreement was reached on a new contract which was uniformly applicable to all members of Exchange, including Frontier. Both the strike and the lockout were then terminated, and the employees of all the members returned to work. The Union thereupon filed a complaint with the Board charging Exchange, and the seven members who had locked out their employees, with unfair-labor practices in violation of § 8(a)(3) and (1) of the Labor Management Relations Act of 1947. The Board overruled the determination of the trial examiner that these employers had engaged in unfair labor practices by locking out the non-striking employees, and dismissed the complaint. The Board held that the strike against Frontier constituted a threat of a strike against all the other members of Exchange and that the non-struck members were justified in locking out their employees until the strike against Frontier ended.

The Union contends that there was no evidence of a threat of a strike against the employers other than Frontier. We think, however, that the Board reasonably inferred such a threat. For previously the Union had
51 conducted its negotiations with Exchange, but here, during such negotiations, it began a strike against Frontier, one member of the Exchange, although there was no peculiar facts concerning the Union's relations with that single member.

We come then to the question at the heart of the case, i.e., whether the threat of a strike legalized the lockouts by those employers against whom no strike had been called.

No provision of the L. M. R. A. of 1947, by its terms, generally specifically prohibits or authorizes lockouts by employers; and the Board, in its opinion, states that it does not hold that the employer's right to lock out its employees is the corollary of the employees' statutory right to strike. In addition, § 7 of the Act guarantees employees the right to engage in "concerted activities" for "their mutual aid or protection"; and it has been held that the right to strike and to support a strike constitutes "concerted activity"

which is protected by the statute.[1] Interference with this right by the employer constitutes an unfair labor practice under § 8 (c) (1) of the Act, and a lockout prompted by a purpose to defeat employee organization or otherwise protected concerted activities is violative of the Act.[2] Such a lockout would also violate § 8(a)(3) of the Act.[3]

52 The Board, in its brief, concedes, as it must, the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice. Up to the time of the decision in the instant case, the Board has held that only in unusual cases of economic hardship is an employer justified in locking out its employees when faced with a threatened strike. Thus, it has held that an employer may close down operations where (1) a spoilage of materials would otherwise result. *Duluth Bottling Association,* 48 N. L. R. B. 1335, 1336, 1359-60; (2) the prospective work stoppage in one of several integrated departments threatens to be of a recurrent nature so that it is difficult for the employer to plan production, *International Shoe Company,* 93 N. L. R. B. 907; or (3) the Union's refusal to give assurance of sufficient advance notice to allow repair work in progress to be finished and returned to customers, renders it economically

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[1] *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *WERB,* 340 U. S. 383, 389-390; *International Union of Automobile, etc. Workers of America, C. I. O.* v. *O'Brien,* 339 U. S. 454, 456-457; *N. L. R. B.* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 255-256.

[2] *N. L. R. B.* v. *Wallick & Schwaler Co.,* 198 F. (2d) 477 (C. A. 3); *N. L. R. B.* v. *Somerset Classics,* 193 F. (2d) 613 (C. A. 2), cert. den. 344 U. S. 816; *Olin Industries* v. *N. L. R. B.* 191 F. (2d) 613 (C. A. 5), cert. den. 343 U. S. 919. See also Koretz, Legality of the Lockout, 4 Syracuse L. Rev. 251, 253-254 (1953); Note, 3 Stanford L. Rev. 510, 517 (1951).

[3] *Associated Press* v. *N. L. R. B.,* 301 U. S. 103; *N. L. R. B.* v. *Schwaler Co.,* 198 F. (2d) 477 (C. A. 3); *N. L. R. B.* v. *Somerset Classics,* 193 F. (2d) 613 (C. A. 2), cert. den. 344 U. S. 816; *Morand Bros. Beverage Co.,* 99 N. L. R. B. 1448, 1460-1466 (on remand).

imprudent for the employer to continue operations, *Betts Cadillac Olds, Inc.*, 96 N. L. R. B. 268.[4]

The Board also concedes in its brief that, "prior to this case, a majority of the Board had interpreted the Act as precluding the non-struck members of an employer unit from utilizing a lockout." See *Morand Bros. Beverage Co.*, 99 N. L. R. B. 1448 (on remand); *Davis Furniture Company*, 94 N. L. R. B. 279, 100 N. L. R. B. 1016 (on remand). In the instant case, the Board departed from its previous position by adopting the position of the Ninth Circuit
53 in *Leonard* v. *N. L. R. B.*, 197 F. (2d) 435, 205 F. (2d) 335 (C. A. 9).[5]

In its second opinion in the *Leonard* case, 205 F. (2d) 355 (C. A. 9), which the Board cited in its opinion here, the Ninth Circuit apparently felt that "whipsawing" (calling a strike against one employer, in a multi-employer unit, at a time) caused economic and operational difficulties such as justified a lockout in cases like *Duluth Bottling Association, supra*. The court stated at 205 F. (2d) 255, 256:

> "The effect of such a recurrent whipsawing process is obvious. No one of the ten remaining dealers could know whether or not its store was next to have its employees sawed off in the continued whipping. Hence none could feel it safe to take orders from its customers which they would be embarrassed by non-deliveries to them. Likewise, no dealer was safe in

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[4] See also *Associated General Contractors*, 105 N.L.R.B. 767.

The Trial Examiner found that "* * * there was no showing that there were any economic considerations which justified the lockout, and none that the respondents' motive was in fact the protection of their economic interests." *Buffalo Linen Supply Co.*, 109 N. L. R. B. 447, 454.

[5] Other circuits, in dicta, have expressed views similar to those of the Ninth Circuit. *N. L. R. B.* v. *Continental Baking Co.*, 221 F. (2d) 427, 431-432 (C. A. 8); *N. L. R. B.* v. *Spalding Avery Lumber Co.*, 220 F. (2d) 673 (C. A. 8); *N.L.R.B.* v. *Morand*, 190 F. (2d) 576, 582 (C. A. 7).

placing orders for furniture with the manufacturers which might well find no employees to unload it in their stores or if so delivered to the stores it would lie as depreciating overstocked inventories."

We think this reasoning of the Ninth Circuit erroneous. The court's rationale would apply as well to cases involving only a single employer threatened with a strike. For he, too, would be faced with the prospect of disappointing his customers or being left with large depreciating inventories. Yet the Board correctly admits that he would not be justified in locking out his employees when they threaten to strike.

54. The Ninth Circuit also reasoned that its decision was necessary because a strike against any one member of an association would find that member too weak economically to stand up under a strike. We seriously doubt whether mere proof of such weakness of an employer, when threatened with a strike, justifies him in utilizing a lockout. But we need not here consider that question. For there is no proof here, and no finding, that any of the employers who locked out was thus economically weak. On the contrary, according to the stipulated facts, the sole reason for the lockouts was the strike against a single member of the association and a desire to end that strike.

The Ninth Circuit regarded as significant the linking of the term "strike and lockout" in the statute, and on that basis concluded that Congress recognizes the two as correlative economic powers. But we think the Board, in *Davis Furniture Company*, 100 N. L. R. B. 1015, 1019, correctly noted that, in each instance where those two words are linked, a particular strike activity is proscribed as unlawful, and the specific inclusion of "lockout" in this context may well have stemmed "from a desire to emphasize even-handed justice where union activity was being restricted." We think the Board in that case was also correct in saying: "We find nothing in the Act which equates lawful strikes and lockouts. On the contrary, only the right to strike is expressly reserved by Congress in Section 13 of the Act. The absence of any similar expressed

reservation of the right to lockout strongly argues against any intent to establish that right."[6]

55 The Board, although relying on the decision of the Ninth Circuit in *Leonard*, goes somewhat further in its reasoning. It seeks to support its new ruling in various ways: (1) Although the threat of a strike involved no peculiar economic hardship to any of the employers not on strike, nevertheless the case comes within the exceptional economic hardship category because the strike against Frontier involved the "destruction of the unitary system of bargaining." (2) Because of the previous bargaining with Exchange, a strike against one member was the equivalent of a strike against all.

The Board's position, no matter how stated, thus comes to this: (1) A union cannot be compelled to bargain in the first instance with several independent employers solely through an association of those employers; (2) however, if the union has so bargained for several years, then, by this voluntary action on its part, it becomes obligated to con-

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[6] In answering the argument that lockouts and strikes should be equated, the Board stated at 100 N. L. R. B. 1020-21, "* * * Nor is the notion correct that strikes and lockouts are 'commensurate weapons' in collective bargaining and that without the right to lockout an employer has no comparable economic weapon. Faced with an impasse in bargaining, the employer still retains control of the terms of employment so long as production continues. He is free to continue the existing terms without any contract, or, indeed, unilaterally to institute any previously proposed changes in those terms. These courses of action are obviously not available to the union * * * Even if the employer is unable to get replacements to permit continued operation in the face of a strike, he is generally in no worse position than the strikers. Both adversaries in the conflict would in such case be under the same economic pressure to terminate the strike and restore the flow of wages and profits. We see no reason in equity or justice to give to employers the privilege of extending the hardship and deprivations of industrial conflict to areas not directly involved, nor could such a privilege be squared with the basic policy of the statute to minimize industrial strife and interruptions to commerce."

tinue bargaining exclusively with the employer association, at least to the extent that, if it strikes against one member of the association, lockouts by the other members become lawful although the lockouts would otherwise be unlawful as unfair labor practices. Such a ruling constitutes unauthorized legislation by the Board in which we cannot acquiesce.

56 The Board has consistently held in the past that any employer may withdraw at will from a multi-employer bargaining unit, despite a history of multi-employer bargaining.[6a] Although it would seem only fair that the union be accorded the same privilege of voluntary withdrawal as is enjoyed by the employer, the Board has limited a union's right to withdraw from a multi-employer unit where there is such a history of multi-employer bargaining. In *Stouffer Corp.*, 101 N. L. R. B. 1331, the Board denied the union's petition, under §9(c) of the Act, in which the union sought to have the Board find the appropriate bargaining unit to be the employees of a single member of an employers' association rather than those of all members in the association with which the union had bargained for the preceding ten years.[7] And in *Morand Brothers Bev-*

[6a] See, *e.g.*, *Bearing & Rim Supply Co.*, 107 N. L. R. B. 101; *Association of Motion Picture Producers*, 88 N.L.R.B. 1155, 1161; *Johnson Optical Company, et al.*, 87 N. L. R. B. 539; *Air Conditioning Company of Southern California*, 81 N. L. R. B. 946, 952; *General Baking Company*, 73 N.L.R.B. 44, 47. See also Freidin, The Taft-Hartley Act and Multi-Employer Bargaining (1948) p. 16; Broderick, Representation Proceedings, University of Illinois Law Forum (1955) 223, 237-238; Note, 3 Stanford L. Rev. 510, 515.

This practice apparently was acceptable to Congress and was approved by it. See 1 Legislative History of The Labor Management Relations Act of 1947 (Government Printing Office 1948) p. 102.

[7] Our views on mutuality of treatment of unions and employers are limited to situations where, as here, an incumbent union seeks to withdraw from multi-employer bargaining and is not opposed in its claim as to the appropriate bargaining unit by another employee group. Thus we ex-

erage Co., 91 N. L. R. B. 409, the Board, passing on a
57 charge of unfair labor practice on the part of the union in refusing to bargain, intimated that the union must bargain to the point of an impasse with the employer association before it may validly revert to individual bargaining with each member of the association.

We see no rational basis for holding, in any context, that at any time any particular employer may, at his will, withdraw from bargaining through an employers' association of which he is a member, while a union is not equally free to discontinue bargaining through such an association:

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press no opinion on the desirability of Board decisions (1) refusing to let a non-incumbent union conduct a representation election in a single-employer unit where there has been a history of multi-employer bargaining and the incumbent union desires the multiple unit. See *Des Moines Packing Co.*, 106 N. L. R. B. 206; *Abbotts Dairies, Inc.*, 97 N. L. R. B. 1064; *American Writing Paper Co.*, 94 N. L. R. B. 1773; *Balaban & Katz (Princess Theatre)*, 87 N. L. R. B. 133; *Cloth Laying Appliances Corp.*, 78 N. L. R. B. 785; (2) denying employees of a single employer a decertification election where their union has, in the past, bargained on a multi-employer basis and desires to continue doing so; *Yardley Plastics Co.*, 111 N. L. R. B. 526; *Grand Rapids Fuel Co.*, 107 N. L. R. B. 1402; (3) denying the incumbent union's request to find a single-employer unit appropriate when a non-incumbent union seeks a representation election in the multi-employer unit with which bargaining had been carried on in the past; see *Archie Bernstein, et al.*, 98 N.L.R.B. 1144; *Belle Vernon Milk Co.*, 90 N. L. R. B. 717.

The Board has indicated that it will allow a union to withdraw from a multi-employer bargaining unit and bargain on an individual basis where the members of the employer association, with which the union had previously bargained, have consented, since it deems this an abandonment of multi-employer bargaining on the part of the employers. *Spalding Avery Lumber Co.*, 103 N. L. R. B. 1516; reversed on the ground that no abandonment of multi-employer bargaining had been intended by the employers, 220 F. (2d) 673 (C. A. 8).

with respect to any particular employer member.[8] On that account, were the issue here that of the appropriate unit in which the union must bargain—concerning which the exercise of the Board's discretion is usually accorded great weight[9]—we would be inclined to think that
58 the Board would "abuse" its discretion in forcing a union to continue bargaining with a multi-employer unit against the union's wishes. In any event, we think that the union here met the test established by the Board in the *Morand* case, i.e., an impasse in the bargaining with the association had been reached before the Union called a strike at Frontier.[10]

The issue here, however, is not the appropriate unit for collective bargaining purposes, but whether a lawful strike against one member of Exchange justified a lockout by the other members. There was no claim here that the Union had refused to bargain; nor did the Union seek certification as representative of a unit smaller than the association-wide unit as in the *Stouffer* case, *supra*. Consequently, here the Board had no occasion to exercise its discretion to determine the appropriate bargaining unit.[11] Hence, we do

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[8] The importance of mutuality of the right to withdraw was cogently put by dissenting Commissioner Styles in *Continental Baking Company*, 99 N. L. R. B. 777, 787-789. See also Note, 3 Stanford L. Rev. 510, 519 (1952).

[9] See, *e.g.*, *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U. S. 485, 491; *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 132-135; *N. L. R. B.* v. *National Broadcasting Co.*, 150 F. (2d) 895, 898 (C. A. 2).

[10] The Union bargained with Exchange from March, 1953 to May 26, 1953, when it called a strike at Frontier after failing to reach agreement on the terms of a new contract. The trial examiner found that there was an "impasse" in the bargaining.

[11] Section 9(b) of the Act authorizes the Board to determine the "unit appropriate for the purposes of collective bargaining." The Board exercises its power under this section in representation proceedings under §9 of the Act to determine the exclusive bargaining representative of the employees in the unit which the Board deems is appropriate. The Board must also determine the appropriate unit for

not intrude on the exercise of the Board's discretionary power to make such a determination when we hold that the Union had a right to withdraw from the multi-employer unit by calling a strike against only one member of Exchange, at least to the extent that the calling of that strike did not render the lockout lawful.

The arguments against legalizing lockouts, merely because a multi-employer unit is involved, were set out by the Board itself in the *Morand* case, 91 N. L. R. B. 409, 412-415, where the Board said, *inter alia*: "In our opinion, the Act does not permit a discharge to reduce, by anticipatory action, the effectiveness of an expected strike
59 by a labor organization. The Board has held, with judicial approval, that an employer's economic interest in preventing a strike does not justify him in engaging in conduct of the type proscribed by the Act. The fact that the expected strike may be so timed or so directed as to place severe economic pressure on the employer does not, in our judgment, remove the strikers from the protection of the Act. Strike activity, actual or threatened, is concerted activity, and concerted activity does not cease to be protected merely because it is, or may be, effective, or because it subjects the employer to economic hardship. Any other view would not only be in derogation of the right of employees to engage in concerted activities but would also conflict with the express policy of the Act to minimize industrial strife. * * * Thus, if in the instant case we accepted the respondents' view * * *, we would be required to hold that a strike against one respondent * * * directly involving only about sixty of its employees, justified the other thirty-four respondents in discharging about seven hundred of their employees, even though they had not participated in the strike but had, in fact, remained at work. As stated in the brief filed on behalf of the General Counsel

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collective bargaining purposes when there is a charge by the union or employer that the other has committed an unfair labor practice under §8(a)(5) or (b)(3) by refusing to bargain in the appropriate unit.

Since the question of the "appropriate" unit is applicable only where the issue involves collective bargaining, it can have no relevance to strike activity by the union.

in support of the Intermediate Report: 'In this case, the effect of granting immunity to the discriminatory lockout by thirty-four employers, in reprisal against the strike against a thirty-fifth employer, would be to multiply the obstruction to commerce. It would set a sweeping precedent for the conversion of any single employer's dispute into an association-wide or industry-wide dispute. An isolated skirmish would become a civil war' • • • The logical corollary of the respondents' position is, therefore, that a union seeking to negotiate a contract with a group of employers, however large, must strike all or none. If it strikes less than all, its members will be deprived of the protection of the Act; if it strikes all, they will be protected.[12] We cannot give such an incongruous construction to an Act designated to minimize industrial strife. • • • To hold that employees in a multi-employer unit who remain at work may be treated as strikers, solely because of a strike by other employees, would involve the introduction of a new concept in labor relations—i.e., the vicarious or constructive strike. We know of no legislative or other warrant for introducing such a concept."

Multi-employer bargaining has never received the express sanction of Congress. It would stretch the usual canons of interpretation unduly far to conclude that, in enacting the Taft-Hartley Act, Congress gave legislative approval

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[12] The difficulty with which a union would be faced if it were placed in the dilemma set forth by the Board can easily be foreseen. For example, if a union representing automobile workers had once bargained collectively with a group representing all the automobile manufacturers, a subsequent strike against, say, the Ford Company would justify General Motors in locking out its employees, regardless of the patent fact that the anticipation of a strike against General Motors would cause it no exceptional economic hardship.

Thus, if we were to accept the Board's reasoning in the instant case, in any case where there is a history of multi-employer bargaining, if the union wishes to call a strike, it must wait until it can afford to strike all the employees in the unit; for if it struck only one, the non-struck members of the association could lock out their employees.

to all the previous Board rulings concerning such bargaining. [13] Even if we assume that it did, still the Board
61 at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the "stability of the employer unit." [14] We think Congress must have intended that such a radical innovation be left open for consideration by the joint committee it set up under §402 of the Act to study, among other things, "the methods and procedures for best carrying out the collective

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[13] It may well be that Congress, in enacting the Taft-Hartley Act, did not intend to interfere with the then established practice of multi-employer bargaining built up by the Board under the Wagner Act. See Freidin, *supra*, pp. 17-34.

A review of the legislative history of the amendments to the Act discloses sharp disagreement over the desirability of multi-employer bargaining. The House Bill (H.R. 3020, 80th Cong. 1st Sess., §9(f)(1)) as passed would have prevented certification of multi-employers units unless they meet certain conditions. Comment was varied and oft-times sharply critical. See 1 Legislative History of the Labor Management Relations Act of 1947 (Govt. Printing Office 1948) pp. 315, 325-327, 364, 377; 584, 612, 630, 636, 643, 653, 663, 672, 680, 716, 758-767, 772-775, 867-868. Senators Taft, Ball, Donnell, and Jenner proposed to meet the problem by limiting the unions eligible to act as representatives of those "composed solely of employees of one employer, or of employees employed in the same metropolitan district or county by different employers," and to further meet the problem by prohibiting an "international union from coercing a local union in the conduct of negotiations." *Id.* at 457; 2 Legislative History, 1217-1218. These proposals, which were not passed by the Senate, likewise elicited comment, favorable and unfavorable. *Id.* at 1217-1256, 1271-1302. Thereafter the proposals relating to multi-employer bargaining were eliminated in conference. 1 Legislative History 550-551.

[14] The cases concerning the question whether the non-struck employers in an association may lock out their employees after a strike against only one of the employer-members, were all decided after the passage of the Taft-Hartley Act of 1947.

bargaining process, with special attention to the effect of industry-wide or regional bargaining upon the national economy."

We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly protected, merely to effectuate a policy as to which Congress has, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the Act and a usurpation of the power of Congress. Neither the Board nor the courts may make so fundamental a
62 change in the existing law as that which would result from the Board's decision. The problems involved in legalizing the lockout in multi-employer situations are manifold, and their solution must be left to Congress.

Since the stipulated facts show no economic justification for the lockout, we hold that the lockout of non-striking employees constituted an interference with their statutory right to engage in concerted activity in violation of §8(a)(1) of the Act, and also constituted discrimination in the hire and tenure of employment of the employees because of the Union's action, thereby discouraging memberships in the Union in violation of §8(a)(3) of the Act.

The Board's order and decision dismissing the complaint must be set aside. The case is remanded to the Board for further proceedings in conformity with this opinion.

WATERMAN, *Circuit Judge* (dissenting):

The National Labor Relations Board decided in this case that the employer members of this multi-employer bargaining unit did not violate the National Labor Relations Act, 29 U. S. C. A. §151 *et seq.*, by locking out their employees when the Union, following several weeks of unsuccessful contract negotiations with the group, engaged in a strike against one of the members in support of its demands against all. The Board concluded that the strike against one member "necessarily carried with it an implicit threat of future strike action against any or all of the other members of the [multi employer bargaining unit.]"[1]
63 In these circumstances, and "in the absence of any independent evidence of anti-union motivation," the

[1] My colleagues accept this conclusion of the Board, holding that the Board reasonably inferred a threat of strike

Board viewed the lockout as "defensive and privileged in nature, rather than retaliatory and unlawful" since it was a necessary means of protecting "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship."

I think that the decision of the Board, which accords with the views of the three Courts of Appeals that have thus far had occasion to consider the problem,[2] is a reasonable and proper construction of the Act. For the reasons set forth below, I would affirm the Board's order dismissing the Union's complaint.

1. *Not every employer interference with a legitimate concerted activity is proscribed by the Act.* Thus, an employer is permitted to replace economic strikers, even though this amounts to a limitation on free exercise of the right to strike. *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. Similarly, where special "economic or operative" problems are presented, an employer may counter a strike threat with an anticipatory lockout. *Duluth Bottling Association*, 48 N. L. R. B. 1335 (spoilage of materials); *International Shoe Co.*, 93 N. L. R. B. 907 (interruption of production); and *Betts Cadillac Olds, Inc.*, 96 N. L. R. B. 268 (inability to finish repair work). In short, where the right to strike collides with legitimate employer interests, the Act leaves to the Board the task of "working out an adjustment." *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, at 797-798.

64 2. *The employers in a multi-employer bargaining unit have a legitimate and vital interest in the continuance of the established unitary system of bargaining.*

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against the non-struck employers. The only important difference between the facts in this case and those in *Leonard* v. *N. L. R. B.*, 9 Cir., 197 F. 2d 435, 205 F. 2d 355, is that here the Union did not make a public announcement of its intentions.

[2] *Leonard* v. *N. L. R. B.*, 9 Cir., 197 F. 2d 435, 205 F. 2d 355; *Morand Bros. Beverage Co.* v. *N. L. R. B.*, 7 Cir., 190 F. 2d 576, 582; *N. L. R. B.* v. *Continental Baking Co.*, 8 Cir., 221 F. 2d 427, 431-432; *N. L. R. B.* v. *Spalding Avery Lumber Co.*, 8 Cir., 220 F. 2d 673, 675.

In this case the eight members of the Exchange are linen supply businesses competing with each other within the Buffalo metropolitan area, and the Union represents the drivers of all Exchange members. The joinder of the employers for purposes of bargaining as a unit with the Union in such circumstances presents a familiar pattern in industrial relations.[3] It allows small employers to bargain on an equal basis with a powerful, industry-wide union, and at the same time avoids the competitive disadvantages resulting from non-uniform contractual terms.[4]

3. *The Board's accommodation of the legitimate interest of the employers in group bargaining and the right of the employees to strike in support of their demands is a reasonable and proper one.* Group bargaining benefits the union and the public as well as the employers. The union minimizes its organizational and administrative expenses; it can more readily standarize wages and other conditions of employment; and it gains security against raiding by other labor organizations.[5] Moreover, insofar as the public
65 is concerned, the experience of the Board and many other specialists in the labor field has shown that strikes within these units tend to be infrequent, and that there is more likely to be full acceptance on both sides of the

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[3] The Board, in its brief, citing Monthly Labor Review, vol. 64, pp. 398, 409 (1947), says that in 1947 there were over 5,000 multi-employer units covering some 4,000,000 employees.

[4] See, *e.g.*, Freiden, The Taft-Hartley Act and Multi-Employer Bargaining (Univ. of Pennsylvania Press, 1948), p. 5; Garrett and Tripp, Management Problems Implicit in Multi-Employer Bargaining (Univ. of Pennsylvania Press, 1949), pp. 2-3; Kerr and Fisher, Multiple-Employer Bargaining: The San Francisco Experience (Univ. of California Press, 1948), pp. 27-30; Hall, Impact of the Bargaining Unit on Labor Management Relations (Second Annual Conference on Labor, N. Y. U., 1949), pp. 39-40.

[5] Kerr and Randall, Multiple-Employer Bargaining in the Pacific Coast Pulp and Paper Industry (Univ. of Pennsylvania Press, 1948), p. 9; Hall, *op. cit.* note 4 *supra*, pp. 43-44.

principle of resolving differences through negotiation.[6] In my judgment the decision from which I am dissenting would tend to undermine these beneficent developments and to convert industrial relations into a pattern of continuous piecemeal strife.

The Board argues that the purposes of multi-employer bargaining are to create uniform terms and conditions of employment at the plants of all employers in the unit, and to achieve on a case-by-case basis an approximate balance of power between organized labor and organized management. From the employers' point of view, the Board says, the major advantage of multi-employer bargaining is that it may give the employers sufficient bargaining power to withstand the divisive pressures of whipsawing. When a union representing all of the employees of a multi-employer group engages in a strike against one of the members of the group, even while pretending to bargain with the group as a whole, it is directly attacking an important interest of all the employers in the group—their interest in group bargaining. The Board feels that the multi-employer bargaining unit will not long survive if the non-struck members are not permitted under such circumstances to use their countervailing force against the Union. I think we should accept the experienced judgment of the Board on such matters.

66 The present decision will tend to destroy the equality of bargaining power and reduced incidence of strikes which have been the hallmarks of multi-employer bargaining.

Moreover, I agree with the Board that the decision of the Court will permit the Union to keep the benefits which it has derived from multi-employer bargaining, while at the same time nullifying the consideration that made such unit desirable from the employers' standpoint. That is to say

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[6] Hall, *op. cit.* note 4 *supra*, p. 44; Kerr and Fisher, *op. cit.* note 4 *supra*, p. 40; Kerr and Randall, *op. cit.* note 5 *supra*, pp. 27-31; Bahrs, The San Francisco Employers' Council (Univ. of Pennsylvania Press, 1948), pp. 37-39; MacDonald, Bob and Sheifer, Labor Relations in Milk Distribution in the New York Metropolitan Area (Matthew Bender & Co., 1951), pp. 575-577; Hill, Teamsters and Transportation (Am. Council on Public Affairs, 1942), p. 202; Note, 65 Harv. L. Rev. 353, 355.

that both sides gain certain benefits and accept certain restrictions when they agree to engage in multi-employer bargaining. The union gains important organizational, raiding and standardization advantages, while the employers gain a protection against whipsawing. This decision would deprive employers of this *quid pro quo*. The Union is enabled to strike the employers one at a time without running the deterrent risks of a unit-wide strike.[7] In this situation, "the right of the employers to lock out temporarily all the employees is no more than equal to the right of the union of all the employees to call out the employees of one after another of the [employers] in the whipsawing manner above described." *Leonard* v. *N. L. R. B.*, 9 Cir., 205 F. 2d 355, 357-358.

4. *There is nothing in the Act of in its legislative history which deprives the Board of power to adjust the conflicting but legitimate interests of employers and employees in this situation.* The Act protects the rights of employees to strike in support of their demands, but this protection is not absolute. It is well settled that employers are not guilty of unfair labor practices when they act in protection of legitimate and vital interests of their own, even though such acts necessarily impinge on the concerted activity of employees. The Act is not a detailed blueprint, but a general guide; and it is the function of the Board to adjust the conflicting interests of employers and employees.[8]

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[7] The majority decision relies heavily on the idea that the Union should be accorded the same freedom of voluntary withdrawal from a multi-employer bargaining unit as the Board has accorded to individual employers. This may be so, but in this case the Union did not seek to withdraw from the unit. It attempted to retain the advantages of group bargaining by pretending to bargain with the multi-employer group, while at the same time taking strike action against one of the members of the group.

[8] "A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less

Multi-employer bargaining is almost as old as the Act itself. The Board has established many multi-employer bargaining units pursuant to 29 U. S. C. A. §159(b), and, when established, employers and unions have the reciprocal duty to bargain in that group. 29 U. S. C. A. §158(a)(5) and (b)(3). Efforts to limit or destroy multi-employer bargaining were made in 1947, but the amended Act (the Taft-Hartley Act) left multi-employer bargaining undisturbed. I do not think it is properly inferable that Congress, by its inaction, meant to leave the question of multi-employer bargaining to be dealt with in future legislation.

On the contrary, considering the long history of
68 multi-employer units, it seems more reasonable that Congress intended that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.

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plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194.

69 In the United States Court of Appeals for the Second Circuit

No. 23424

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE—Filed March 13, 1956

Before Clark, Frank and Waterman, Circuit Judges

This cause came on to be heard upon the petition of Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL to review an order of the National Labor Relations Board dated July 26, 1954. The Court heard argument of respective counsel on October 14, 1955, and on February 14, 1956 being fully advised in the premises, handed down its decision setting aside the Board's order and remanding the case to the Board in conformity therewith, it is hereby

Ordered, adjudged, and decreed that the Board's order of July 26, 1954 be and it hereby is set aside and remanded to the Board for further proceedings in conformity with the Court's opinion.

(S.) JEROME N. FRANK,
Judge, United States Court of Appeals for the Second Circuit.

(S.) STERRY R. WATERMAN,
Judge, United States Court of Appeals for the Second Circuit.

70 [File endorsement omitted.]

71 Clerk's Certificate to foregoing transcript omitted in printing.

72 Supreme Court of the United States, October Term, 1956

No. 103

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 405561 - 477

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 13, 1956, setting aside the Board's order dismissing the complaint issued upon a charge filed by Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., herein called the Union, and remanding the case to the Board for further proceedings.

OPINIONS BELOW

The opinion of the court below (App. A, *infra*, pp. 17-40) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 22-32, 38-41)[1] are reported at 109 NLRB 447.

JURISDICTION

The judgment of the court below was entered on March 13, 1956 (App. A, *infra*, pp. 40-41). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Where employers bargain jointly, in a multi-employer association, with the union representing their employees, and the union supports its bargaining demands by a strike against one employer in the group, are the other employers, threatened by successive and separate strikes against themselves, permitted under the National Labor Relations Act to close their plants until the strike is terminated?

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), appear in Appendix B, *infra*, pp. 41-42.

STATEMENT

1. *The facts.*—For a period of thirteen years the eight linen supply companies located in the

[1] References designated "R" are to the Joint Appendix to the briefs in the court below.

cities of Buffalo, Niagara Falls and Dunkirk, New York, have bargained as a group with the Union, which represents the truck drivers of all eight companies (R. 39; 16). It has been customary for the Union to negotiate contracts of uniform application to all the companies at regular intervals with the association of which the employers are members, the Linen and Credit Exchange, following which such contracts are approved and signed by each company (*ibid.*).

In the spring of 1953, when negotiations between the Exchange and the Union for a new contract failed to bring agreement, the Union struck Frontier Linen Supply Co., one of the members of the Exchange (R. 39; 17-18). A picket line was established at Frontier's plant only, and the Union members continued to work at the remaining seven companies (R. 39; 18). On the day following the strike at Frontier, however, the non-struck members of the Exchange laid off their employees and notified the Union that operations would not be resumed until the strike at Frontier was terminated *(ibid.)*. About a week later, following continued negotiations between the Exchange and the Union, a new contract, uniformly applicable to all members of the Exchange, was executed (R. 39; 20). Thereupon, the strike was called off, the non-struck employers recalled their employees to work, and all eight companies once again began normal operations (*ibid.*).

2. *The Board's decision.*—Upon the foregoing facts, the Board, Member Murdock dissenting,

found that the non-struck employers were entitled to shut down their operations during the strike against Frontier, and therefore dismissed the complaint which charged that they had committed an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act by thus laying off their employees (R. 41). As a factual premise for its determination, the Board found that, in view of the established practice of negotiating a contract uniformly applicable to all members of the Exchange, the strike against Frontier was in support of demands which were common as to all eight companies, and thus "necessarily carried with it an implicit threat of future strike action against any or all of the other members of the [Exchange]" (R. 40). The tactic of waging separate and successive strikes against the several employer members of a multi-employer bargaining unit was considered by the Board to be an exertion of "economic pressure to atomize the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 40). The Board concluded that the employers, in order to defend their interests in the multi-employer bargaining unit which the threat of successive strikes endangered, "and in the absence of any independent evidence of antiunion motivation," were privileged to shut down their operations during the strike against one of their number (R. 40-41).[2]

[2] The Board found it unnecessary upon the facts of this case to pass upon the issue whether an employer lockout is a corol-

3. *The decision of the Court of Appeals.*—The Court of Appeals affirmed the Board's finding that in the circumstances the strike against Frontier implied that successive strikes would be waged against the remaining members of the Exchange, but, with Judge Waterman dissenting, rejected the Board's conclusion that the non-struck members of the Exchange acted lawfully when they laid off their employees. Accordingly, the court set aside the Board's order dismissing the complaint and remanded the case to the Board for further proceedings.

Noting in its opinion that ordinarily "an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (App. A, *infra*, p. 21), the court below found no special considerations warranting a departure from that rule in a multi-employer bargaining relationship where the union undertakes to initiate a series of separate strikes against the employers. It reasoned that the Union's strike in this case constituted in effect a "withdraw[al] from multi-employer bargaining,"

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lary of the employees' statutory right to strike. It stated (R. 41):

> We have done no more in this case than affirm the legal concept enunciated by the Ninth Circuit Court of Appeals in the *Davis Furniture* case [205 F.2d 355] which provides that a strike by employees against one employer-member of a multi-employer bargaining unit constitutes a threat of strike action against the other employers, which threat, *per se*, constitutes the type of economic or operative problem at the plants of the non-struck employers which legally justifies their resort to a temporary lockout of employees. [Footnote omitted]

and declared that this course of action was open to the Union under the Act in view of Board holdings to the effect that an employer is entitled to discontinue at will participation in group bargaining.

Answering the contention that the strike constituted a direct assault on "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 40), and that the non-struck employers were entitled to protect that interest, the court stated (App. A, *infra*, pp. 31-33):

> Multi-employer bargaining has never received the express sanction of Congress. It would stretch the usual canons of interpretation unduly far to conclude that, in enacting the Taft-Hartley Act, Congress gave legislative approval to all the previous Board rulings concerning such bargaining. Even if we assume that it did, still the Board at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the "stability of the employer unit."
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> * * * * *
>
> We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly protected, merely to effectuate a policy as to which Congress has, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the Act and a usurpation of the power of Con-

> gress. Neither the Board nor the courts may make so fundamental a change in the existing law as that which would result from the Board's decision. [Footnotes omitted]

In reaching this conclusion the court expressly disagreed with the decision of the Ninth Circuit in *Davis Furniture* v. *National Labor Relations Board*, 197 F. 2d 435, 205 F. 2d 355, which the Board followed in this case.[3] In addition, the court observed that both the Seventh [4] and Eighth [5] Cir-

[3] In *Davis Furniture*, the Ninth Circuit rejected the Board's original position on the question here presented, that the Act forbade employer lockouts in defense against piecemeal strike tactics in a multi-employer bargaining relationship. When the present case came before it, the Board reconsidered its earlier views, and concluded that it should "affirm the legal concept enunciated by the Ninth Circuit . . . in the *Davis Furniture* case" (R. 41).

[4] In *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576 (C.A. 7), the Seventh Circuit held, in conformity with the Board's position in this case, that the non-struck employers in a multi-employer bargaining relationship were entitled to impose a lockout when one of them was struck in support of common contract demands. The case was remanded to the Board, however, for findings on the question of whether the employees in that case had been permanently discharged rather than temporarily locked out, a difference which was critical to the Seventh Circuit's decision in view of the settled law "that an employer's discharge of his employees because of their . . . strike activity . . . is an unfair labor practice" (190 F. 2d at 583). In subsequent proceedings the Board's order against the employers was enforced by the Seventh Circuit upon its affirmance of the Board's findings, made on remand, that the employees had been discharged. 204 F. 2d 529, certiorari denied, 346 U.S. 909.

[5] In *National Labor Relations Board* v. *Continental Baking Co.*, 221 F. 2d 427, and *National Labor Relations Board* v. *Spalding Avery Lumber Co.*, 220 F. 2d 673, the Eighth Cir-

cuits "have expressed views similar to those of the Ninth Circuit" (App. A, *infra*, p. 22).

REASONS FOR GRANTING THE WRIT

1. As the court below has made explicit, its decision is in conflict with that of the Ninth Circuit in *Davis Furniture* v. *National Labor Relations Board, supra,* 197 F. 2d 435, 205 F. 2d 355. In both cases the non-struck employers in a multi-employer bargaining unit closed down operations when the union with which they bargained struck one of their number and threatened successive strikes against the remainder in support of common contract demands. In the *Davis Furniture* case, this "whipsawing" tactic was openly announced by the union (197 F. 2d at 437); here, the court affirmed the Board's conclusion of fact that the threat of piecemeal strikes against the members of the Exchange was implicit in the strike against Frontier (App. A, *infra,* p. 20). Similarly, it was established in both cases that the employers did not act in reprisal against their employees for resorting to the threat of strike activity: in *Davis Furniture,* a Board finding of improper motivation was reversed by the Ninth Circuit for want of supporting

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cuit rejected the Board's factual findings that the employers in those cases had locked out their employees for the purpose of discouraging strike activity rather than for defensive reasons, and denied enforcement of the Board's orders. In those cases, as here, a union had struck one employer in a multi-employer bargaining unit, and the remainder had thereupon shut down operations. The opinions in those cases indicate approval of the Ninth Circuit's decision in *Davis Furniture, supra.*

evidence (197 F. 2d at 437), and in this case the court did not disturb the Board's finding of an "absence of any independent evidence of anti-union motivation" (R. 40). Accordingly, the question of law in both cases is identical:—whether the Act permits the non-struck employers to close down in defense against such whipsawing tactics, so long as the strike against one of the employers in the unit continues. The Ninth Circuit in the *Davis* case answered this question in the affirmative. The court below expressly rejected both the reasoning and conclusion of the Ninth Circuit and held that such a lockout constitutes a violation of the Act.

In addition, the decision in this case conflicts with decisions of the Seventh and Eighth Circuits. Contrary to the observation of the court below, that the views of these courts were expressed in "dicta" (App. A, *infra*, p. 22; n. 5), we believe that the holdings in the cases in question rest on the entitlement of employers to suspend operations in the same factual context as the one in this case. Thus, in *National Labor Relations Board* v. *Morand Brothers, supra*, 190 F. 2d 576 (C.A. 7), the remand to the Board to make findings as to whether the employees were permanently discharged (*supra*, p. 7, n. 4) was occasioned by the ruling of the Seventh Circuit in that case that the employers could lawfully impose a temporary lockout. Similarly, denial of enforcement of the Board's orders by the Eighth Circuit in *National Labor Relations Board* v. *Continental Baking Co., supra*, 221 F. 2d 427, and *National Labor Relations Board*

v. *Spalding Avery Lumber Co., supra,* 220 F. 2d 673, upon rejection of the Board's factual findings that the lockouts by the non-struck employers in those cases were improperly motivated, is consistent only with the holding that, absent such improper motivation, the employers could lawfully act as they did. Accordingly, there is, we submit, square conflict between the Seventh, Eighth and Ninth Circuits, on the one hand, and the court below, on the other, with respect to the question presented in this case.

2. Resolution of the question presented is of manifest practical importance in increasingly large numbers of bargaining relationships. According to information furnished by the Bureau of Labor Statistics, but not as yet published, there were, as of January 1956, approximately 4 million employees out of a total of 9 million covered in a survey made by the Bureau working under contracts executed by multi-employer associations. See also BLS Report No. 1 (Gov't Printing Office, 1953); Monthly Labor Review, Bureau of Labor Statistics, Vol. 64, pp. 398, 409 (Gov't Print. Off., 1947).

The evolution and practice of group bargaining among competing employers whose employees are represented by a single union may largely be explained in terms of an effort by employers to standardize employment conditions in their plants, and to avoid, by the kind of concerted action resorted to in this case, the divisive and harmful effect of

whipsawing.[6] By engaging in piecemeal strikes within a multi-employer unit, a union makes a direct assault on "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 40). If the ruling below is correct, one of the principal reasons for the formation of such units will have disappeared. More than that, if the non-struck employers cannot suspend operations in order to defend against such whipsawing, the "unit power of collective bargaining would be impaired and ultimately the organization itself destroyed." *Davis Furniture* v. *National Labor Relations Board,* 197 F. 2d 435, 437 (C.A. 9). Accordingly, intelligent utilization, and perhaps even the continued existence, of this practice may depend in large measure on a clear understanding by the parties as to whether piecemeal

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[6] See, *e.g.*, Freiden, *The Taft-Hartley Act and Multi-Employer Bargaining* (Univ. of Pennsylvania Press, 1948), p. 5; Garrett and Tripp, *Management Problems Implicit in Multi-Employer Bargaining* (Univ. of Pennsylvania Press, 1949), pp. 2-3; Kerr and Fisher, *Multiple Employer Bargaining: The San Francisco Experience* (Univ. of California Press, 1948), pp. 27-30; Hall, *Impact of the Bargaining Unit on Labor Management Relations* (Second Annual Conference on Labor, N.Y.U., 1949), pp. 29, 39-40. As stated by the Court of Appeals for the Ninth Circuit, "Congress, in permitting small employers to strengthen their positions by joining multi-employer associations, undoubtedly had in mind the power of large unions to coerce these less financially able small employers." *Davis Furniture Co.* v. *National Labor Relations Board*, 197 F. 2d 435, 438.

As noted in the dissenting opinion in the court below, group bargaining also presents attractive features to unions, and has generally resulted in less frequent strikes (App. A, *infra*, p. 36).

strike action may be met with a concerted shutdown by the employers in such a unit.

3. The major premise of the decision of the court below—that whipsawing amounts in legal effect to a withdrawal by the union from the multi-employer unit (*supra*, p. 29)—misconceives the nature of the strike tactic resorted to by the Union in this case.[7] As observed in the dissenting opinion, the Union did not seek to withdraw from the unit; it continued to bargain with the Exchange for a unit-wide contract as before (App. A, *infra*, p. 38, n. 7). This, indeed, is the usual pattern, for the goal of whipsawing is accession by all employers in the unit to uniform contract terms which the striking union first seeks through negotiation in the multi-employer unit. Whipsawing thus represents an effort to retain the advantage and structure of the multi-employer unit and simultaneously to destroy, by a divide-and-conquer strategy, the employers' unity of position.

For these reasons, the question which the court

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[7] The Board has held that where multi-employer bargaining has in fact come to an end, a strike against a single employer to obtain a contract with him alone does not justify a lockout by the remaining employers in the former unit. *Spalding Avery Lumber Co.*, 103 NLRB 1516. The difference in this case between the Board's position and that of the court below, however, is not merely as to whether the facts show a valid withdrawal from the multi-employer unit. The court below construes the piecemeal strike technique to constitute, as a matter of law, a termination of multi-employer bargaining and of any interest therein which employers might legitimately protect by appropriate action. This view rejects the principle of statutory accommodation which the Board believes to be applicable in this situation.

below thought controlling here—whether the Union was entitled in the circumstances of this case to withdraw from the multi-employer unit—is not germane to decision in this case.[8] Nor does the fact that the suspension of operations by the non-struck members of the Exchange interfered with the Union's protected right to engage in strike activity provide a dispositive answer. For, as the dissenting opinion points out, "Not every employer interference with a legitimate concerted activity is proscribed by the Act" (App. A, p. 34). See *National Labor Relations Board* v. *Mackay,* 304 U.S. 333; *National Labor Relations Board* v. *Babcock and Wilcox Company,* decided April 30, 1956, 24 L.W. 4229. Rather, the propriety of employer action to combat whip-sawing turns on the extent to which the Act recognizes and accommodates an employer interest in multi-employer bargaining.

In concluding that the Act affords employers no defensible interest in multi-employer bargaining because the practice "has never received the ex-

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[8] Accordingly, neither the correctness of Board rulings, with which the court below expresses disagreement, relating to the right of unions to terminate a multi-employer bargaining relationship, nor the appropriateness of the multi-employer unit in which the Union has bargained, may properly be regarded as issues in this case. It may be noted, however, that one of the reasons given by the court below for avoiding decision as to the appropriateness of the multi-employer unit—that the parties had reached an impasse in bargaining which entitled the Union to discontinue bargaining in that unit—rests on an apparent misreading of the trial examiner's findings. Contrary to the court's statement (App. A, *infra,* p. 28, n. 10), the trial examiner found that an impasse was "absent here so far as the record shows" (R. 28).

press sanction of Congress," the court below overlooked both the important role played by such units in bargaining relationships established under the provisions of the Act and the recognition given them by Congress in enacting the 1947 amendments to the Act. Thus, from the earliest years under the Wagner Act, the Board has established multi-employer units, and they have proved efficacious in lessening industrial strife and benefiting the parties thereto. *Supra*, p. 11. As the court below concedes (App. A, infra, p. 31, n. 13), Congress, in 1947, evidenced its intention not "to interfere with [this] practice. . . ." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 46-47, 1 *Legislative History of the Labor Management Relations Act, 1947*, 550-551 (Gov't Print. Off. 1948).

In defending themselves against the divisive pressures of whipsawing, the non-struck employers in this case acted to preserve a bargaining relationship in which they had a legitimate and established interest. The course they followed did no more than implement the theory of multi-employer bargaining by treating a strike against one of their number, to enforce demands against all, as a strike against all. The temporary shutdown wrought no permanent penalty for striking, but simply permitted the Union's resort to its economic strength to be met by the same forces as those involved in the contractual negotiations which preceded the strike. Accordingly, we believe the court below erred in not accepting as reasonable and valid the accommodation worked out by the Board between

the competing interests of the Union in striking and of the employers in preserving the integrity of the unit.[9]

[9] Overlooking the special problems relating to the multi-employer unit, as distinguished from the case of a lockout by a single employer, the court below emphasized that the Board "concedes, as it must, the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (App. A., infra, p. 21). As noted above (p. 4, n. 2), the Board expressly stated that upon the facts of this case it was unnecessary to pass upon that issue. Prior Board decisions have recognized that a suspension of operations by an individual employer is permissible in anticipation of a strike where the employer's action is prompted by a purpose to avoid serious prospective economic loss or business disruption that a strike might bring about. See *e.g.*, *Duluth Bottling Association*, 48 NLRB 1335, 1359-1360; *International Shoe Co.*, 93 NLRB 907; *Betts Cadillac Olds, Inc.*, 96 NLRB 268. Where, however, a lockout is prompted by a punitive or discriminatory purpose, the Board has found it to be violative of the Act. *Somerset Classics, Inc.*, 90 NLRB 1676, enforced 193 F. 2d 613 (C.A. 2), certiorari denied, 344 U.S. 816.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Solicitor General.

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National Labor Relations Board.

MAY, 1956.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 86—October Term, 1955

Docket No. 23424

Argued October 14, 1955 Decided February 14, 1956.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

Before:

CLARK, FRANK and WATERMAN, CIRCUIT JUDGES.

Petition to review and set aside an order of the National Labor Relations Board. GRANTED.

FRANK, *Circuit Judge:*

Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L. (hereinafter referred to as the Union) seeks review under § 10 of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. §151 *et seq.*) (hereinafter referred to as the Act) of an order of the National Labor Relations Board, dismissing an unfair-labor-practices complaint in which it is the charging party. The Union asks,

that the order of the Board be set aside. The decision of the Board is reported at 109 N. L. R. B. 447.

The case was tried on an agreed state of facts which are substantially as follows:

The Union represents all the truck-driver employees of the members of the Linen and Credit Exchange (hereinafter called the Exchange), an employer association representing eight employers in collective bargaining negotiations with the Union. However, it does not appear from the stipulated facts that the Union has been certified by the Board as bargaining agent for the association-wide unit. The terms of the agreements were worked out by the representatives of Exchange and the Union, and then submitted to the membership of Exchange and the Union for majority approval. When majority approval was given, the agreement was signed by each member of Exchange and by the Union. This had been the practice for the thirteen years preceding this controversy.

Sixty days before April 30, 1953, when the contract (which contained an automatic renewal clause requiring notice of a desire to change the contract to be given sixty days before the expiration date) was to expire, the Union notified Exchange of its desire to open negotiations to change the agreement. In March, 1953, negotiations were begun for a new collective bargaining agreement. Meetings were held during the succeeding weeks but no agreement was reached. On May 26, 1953, the truck-driver employees of Frontier Linen Supply,

Inc., a member of Exchange, went on strike, but the employees of the other seven members remained on the job.

On the evening that the strike against Frontier began, Exchange notified the Union that the other members were laying off all their truck-driver employees until the strike at Frontier was ended. A lockout by these seven members of Exchange followed; at the succeeding negotiations, the Union was told that the employees of all such members would be recalled to work if the picket-line at Frontier were withdrawn and the strike terminated.

On June 3, 1953, agreement was reached on a new contract which was uniformly applicable to all members of Exchange, including Frontier. Both the strike and the lockout were then terminated, and the employees of all the members returned to work. The Union thereupon filed a complaint with the Board charging Exchange, and the seven members who had locked out their employees, with unfair-labor practices in violation of §8(a)(3) and (1) of the Labor Management Relations Act of 1947. The Board overruled the determination of the trial examiner that these employers had engaged in unfair labor practices by locking out the non-striking employees, and dismissed the complaint. The Board held that the strike against Frontier constituted a threat of a strike against all the other members of Exchange and that the non-struck members were justified in locking out their employees until the strike against Frontier ended.

The Union contends that there was no evidence

of a threat of a strike against the employers other than Frontier. We think, however, that the Board reasonably inferred such a threat. For previously the Union had conducted its negotiations with Exchange, but here, during such negotiations, it began a strike against Frontier, one member of the Exchange, although there was no peculiar facts concerning the Union's relations with that single member.

We come then to the question at the heart of the case, i.e., whether the threat of a strike legalized the lockouts by those employers against whom no strike had been called.

No provision of the L. M. R. A. of 1947, by its terms, generally specifically prohibits or authorizes lockouts by employers; and the Board, in its opinion, states that it does not hold that the employer's right to lock out its employees is the corollary of the employees' statutory right to strike. In addition, § 7 of the Act guarantees employees the right to engage in "concerted activities" for "their mutual aid or protection"; and it has been held that the right to strike and to support a strike constitutes "concerted activity" which is protected by the statute.[1] Interference with this right by the employer constitutes an unfair labor practice under §8(c)(1) of the Act, and a lockout prompted by a purpose to defeat employee organization or otherwise protected concerted activities is violative

[1] *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *WERB*, 340 U. S. 383, 389-390; *International Union of Automobile, etc. Workers of America, C. I. O.* v. *O'Brien*, 339 U. S. 454, 456-457; *N. L. R. B.* v. *Fansteel Mettallurgical Corp.*, 306 U. S. 240, 255-256.

of the Act.[2] Such a lockout would also violate §8 (a)(3) of the Act.[3]

The Board, in its brief, concedes, as it must, the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice. Up to the time of the decision in the instant case, the Board has held that only in unusual cases of economic hardship is an employer justified in locking out its employees when faced with a threatened strike. Thus, it has held that an employer may close down operations where (1) a spoilage of materials would otherwise result, *Duluth Bottling Association,* 48 N. L. R. B. 1335, 1336, 1359-60; (2) the prospective work stoppage in one of several integrated departments threatens to be of a recurrent nature so that it is difficult for the employer to plan production, *International Shoe Company,* 93 N. L. R. B. 907; or (3) the Union's refusal to give assurance of sufficient advance notice to allow repair work in progress to be finished and returned to customers, renders it economically imprudent for the employer to con-

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[2] *N. L. R. B.* v. *Wallick & Schwaler Co.,* 198 F. (2d) 477 (C. A. 3); *N. L. R. B.* v. *Somerset Classics,* 193 F. (2d) 613 (C. A. 2), cert. den. 344 U. S. 816; *Olin Industries* v. *N. L. R. B.,* 191 F. (2d) 613 (C. A. 5), cert. den. 343 U. S. 919. See also Koretz, Legality of the Lockout, 4 Syracuse L. Rev. 251, 253-254 (1953); Note 3 Stanford L. Rev. 510, 517 (1951).

[3] *Associated Press* v. *N. L. R. B.,* 301 U. S. 103; *N. L. R. B.* v. *Schwaler Co.,* 198 F. (2d) 477 (C. A. 3); *N. L. R. B.* v. *Somerset Classics,* 193 F. (2d) 613 (C. A. 2), cert. den. 344 U. S. 816; *Morand Bros. Beverage Co.,* 99 N. L. R. B. 1448, 1460-1466 (on remand).

tinue operations, *Betts Cadillac Olds, Inc.*, 96 N. L. R. B. 268.[4]

The Board also concedes in its brief that, "prior to this case, a majority of the Board had interpreted the Act as precluding the non-struck members of an employer unit from utilizing a lockout." See *Morand Bros. Beverage Co.*, 99 N. L. R. B. 1448 (on remand); *Davis Furniture Company*, 94 N. L. R. B. 279, 100 N. L. R. B. 1016 (on remand). In the instant case, the Board departed from its previous position by adopting the position of the Ninth Circuit in *Leonard* v. *N. L. R. B.*, 197 F. (2d) 435, 205 F. (2d) 335 (C. A. 9).[5]

In its second opinion in the *Leonard* case, 205 F. (2d) 355 (C. A. 9), which the Board cited in its opinion here, the Ninth Circuit apparently felt that "whipsawing" (calling a strike against one employer, in a multi-employer unit, at a time) caused economic and operational difficulties such as justified a lockout in cases like *Duluth Bottling Association, supra.* The court stated at 205 F. (2d) 255, 256:

> "The effect of such a recurrent whipsawing process is obvious. No one of the ten remain-

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[4] See also *Associated General Contractors*, 105 N. L. R. B. 767.

The Trial Examiner found that "* * * there was no showing that there were any economic considerations which justified the lockout, and none that the respondents' motive was in fact the protection of their economic interests." *Buffalo Linen Supply Co.*, 109 N. L. R. B. 447, 454.

[5] Other circuits, in dicta, have expressed views similar to those of the Ninth Circuit. *N. L. R. B.* v. *Continental Baking Co.*, 221 F. (2d) 427, 431-432 (C. A. 8); *N. L. R. B.* v. *Spalding Avery Lumber Co.*, 220 F. (2d) 673 (C. A. 8); *N. L. R. B.* v. *Morand*, 190 F. (2d) 576, 582 (C. A. 7).

ing dealers could know whether or not its store was next to have its employees sawed off in the continued whipping. Hence none could feel it safe to take orders from its customers which they would be embarrassed by non-deliveries to them. Likewise, no dealer was safe in placing orders for furniture with the manufacturers which might well find no employees to unload it in their stores or if so delivered to the stores it would lie as depreciating overstocked inventories."

We think this reasoning of the Ninth Circuit erroneous. The court's rationale would apply as well to cases involving only a single employer threatened with a strike. For he, too, would be faced with the prospect of disappointing his customers or being left with large depreciating inventories. Yet the Board correctly admits that he would not be justified in locking out his employees when they threaten to strike.

The Ninth Circuit also reasoned that its decision was necessary because a strike against any one member of an association would find that member too weak economically to stand up under a strike. We seriously doubt whether mere proof of such weakness of an employer, when threatened with a strike, justifies him in utilizing a lockout. But we need not here consider that question. For there is no proof here, and no finding, that any of the employers who locked out was thus economically weak. On the contrary, according to the stipulated facts, the sole reason for the lockouts was the strike against a single member of the association and a desire to end that strike.

The Ninth Circuit regarded as significant the linking of the term "strike and lockout" in the statute, and on that basis concluded that Congress recognizes the two as correlative economic powers. But we think the Board, in *Davis Furniture Company,* 100 N. L. R. B. 1015, 1019, correctly noted that, in each instance where those two words are linked, a particular strike activity is proscribed as unlawful, and the specific inclusion of "lockout" in this context may well have stemmed "from a desire to emphasize even-handed justice where union activity was being restricted." We think the Board in that case was also correct in saying: "We find nothing in the Act which equates lawful strikes and lockouts. On the contrary, only the right to strike is expressly reserved by Congress in Section 13 of the Act. The absence of any similar expressed reservation of the right to lockout strongly argues against any intent to establish that right."[6]

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[6] In answering the argument that lockouts and strikes should be equated, the Board stated at 100 N. L. R. B. 1020-21, "* * * Nor is the notion correct that strikes and lockouts are 'commensurate weapons' in collective bargaining and that without the right to lockout an employer has no comparable economic weapon. Faced with an impasse in bargaining, the employer still retains control of the terms of employment so long as production continues. He is free to continue the existing terms without any contract, or, indeed, unilaterally, to institute any previously proposed changes in those terms. These courses of action are obviously not available to the union * * * Even if the employer is unable to get replacements to permit continued operation in the face of a strike, he is generally in no worse position than the strikers. Both adversaries in the conflict would in such case be under the same economic pressure to terminate the strike and restore the flow of wages and profits. We see no reason

The Board, although relying on the decision of the Ninth Circuit in *Leonard,* goes somewhat further in its reasoning. It seeks to support its new ruling in various ways: (1) Although the threat of a strike involved no peculiar economic hardship to any of the employers not on strike, nevertheless the case comes within the exceptional economic hardship category because the strike against Frontier involved the "destruction of the unitary system of bargaining." (2) Because of the previous bargaining with Exchange, a strike against one member was the equivalent of a strike against all.

The Board's position, no matter how stated, thus comes to this: (1) A union cannot be compelled to bargain in the first instance with several independent employers solely through an association of those employers; (2) however, if the union has so bargained for several years, then, by this voluntary action on its part, it becomes obligated to continue bargaining exclusively with the employer association, at least to the extent that, if it strikes against one member of the association, lockouts by the other members become lawful although the lockouts would otherwise be unlawful as unfair labor practices. Such a ruling constitutes unauthorized legislation by the Board in which we cannot acquiesce.

The Board has consistently held in the past that any employer may withdraw at will from a multi-employer bargaining unit, despite a history of

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in equity or justice to give to employers the privilege of extending the hardship and deprivations of industrial conflict to areas not directly involved, nor could such a privilege be squared with the basic policy of the statute to minimize industrial strife and interruptions to commerce."

multi-employer bargaining.[6a] Although it would seem only fair that the union be accorded the same privilege of voluntary withdrawal as is enjoyed by the employer, the Board has limited a union's right to withdraw from a multi-employer unit where there is such a history of multi-employer bargaining. In *Stouffer Corp.*, 101 N. L. R. B. 1331, the Board denied the union's petition, under §9(c) of the Act, in which the union sought to have the Board find the appropriate bargaining unit to be the employees of a single member of an employers' association rather than those of all members in the association with which the union had bargained for the preceding ten years.[7] And in *Morand*

[6a] See, *e.g.*, *Bearing & Rim Supply Co.*, 107 N. L. R. B. 101; *Association of Motion Picture Producers*, 88 N. L. R. B. 1155, 1161; *Johnson Optical Company, et al.*, 87 N. L. R. B. 539; *Air Conditioning Company of Southern California*, 81 N. L. R. B. 946, 952; *General Baking Company*, 73 N. L. R. B. 44, 47. See also Freidin. The Taft-Hartley Act and Multi-Employer Bargaining (1948) p. 16; Broderick, Representation Proceedings, University of Illinois Law Forum (1955) 223, 237-238; Note, 3 Stanford L. Rev. 510, 515.

This practice apparently was acceptable to Congress and was approved by it. See 1 Legislative History of The Labor Management Relations Act of 1947 (Government Printing Office 1948) p. 102.

[7] Our views on mutuality of treatment of unions and employers are limited to situations where, as here, an incumbent union seeks to withdraw from multi-employer bargaining and is not opposed in its claim as to the appropriate bargaining unit by another employee group. Thus we express no opinion on the desirability of Board decisions (1) refusing to let a non-incumbent union conduct a representation election in a single-employer unit where there has been a history of multi-employer bargaining and the incumbent union desires the multiple unit. See *Des Moines Packing Co.*, 106 N. L. R. B. 206; *Abbotts Dairies, Inc.*, 97 N. L. R. B. 1064; *American Writing Paper Co.*, 94 N. L. R. B. 1773; *Balaban*

Brothers Beverage Co., 91 N. L. R. B. 409, the Board, passing on a charge of unfair labor practice on the part of the union in refusing to bargain, intimated that the union must bargain to the point of an impasse with the employer association before it may validly revert to individual bargaining with each member of the association.

We see no rational basis for holding, in any context, that at any time any particular employer may, at his will, withdraw from bargaining through an employers' association of which he is a member, while a union is not equally free to discontinue bargaining through such an association with respect to any particular employer member.[8] On

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& Katz (Princess Theatre), 87 N. L. R. B. 133; *Cloth Laying Appliances Corp.*, 78 N. L. R. B. 785 (2) denying employees of a single employer a decertification election where their union has, in the past, bargained on a multi-employer basis and desires to continue doing so; *Yardley Plastics Co.*, 111 N. L. R. B. 526; *Grand Rapids Fuel Co.*, 107 N. L. R. B. 1402; (3) denying the incumbent union's request to find a single-employer unit appropriate when a non-incumbent union seeks a representation election in the multi-employer unit with which bargaining had been carried on in the past; see *Archie Bernstein, et al.*, 98 N. L. R. B. 1144; *Belle Vernon Milk Co.*, 90 N. L. R. B. 717.

The Board has indicated that it will allow a union to withdraw from a multi-employer bargaining unit and bargain on an individual basis where the members of the employer association with which the union had previously bargained, have consented, since it deems this an abandonment of multi-employer bargaining on the part of the employers. *Spalding Avery Lumber Co.*, 103 N. L. R. B. 1516; reversed on the ground that no abandonment of multi-employer bargaining had been intended by the employers, 220 F. (2d) 673 (C. A. 8).

[8] The importance of mutuality of the right to withdraw was cogently put by dissenting Commissioner Styles in *Continental Baking Company*, 99 N. L. R. B. 777, 787-789. See also Note, 3 Stanford L. Rev. 510, 519 (1952).

that account, were the issue here that of the appropriate unit in which the union must bargain—concerning which the exercise of the Board's discretion is usually accorded great weight[9]—we would be inclined to think that the Board would "abuse" its discretion in forcing a union to continue bargaining with a multi-employer unit against the union's wishes. In any event, we think that the union here met the test established by the Board in the *Morand* case, i.e., an impasse in the bargaining with the association had been reached before the Union called a strike at Frontier.[10]

The issue here, however, is not the appropriate unit for collective bargaining purposes, but whether a lawful strike against one member of Exchange justified a lockout by the other members. There was no claim here that the Union had refused to bargain; nor did the Union seek certification as representative of a unit smaller than the association-wide unit as in the *Stouffer* case, *supra*. Consequently, here the Board had no occasion to exercise its discretion to determine the appropriate bargaining unit.[11] Hence, we do not intrude on

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[9] See, *e.g.*, *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U. S. 485, 491; *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 132-135; *N. L. R. B.* v. *National Broadcasting Co.*, 150 F. (2d) 895, 898 (C. A. 2).

[10] The Union bargained with Exchange from March, 1953 to May 26, 1953, when it called a strike at Frontier after failing to reach agreement on the terms of a new contract. The trial examiner found that there was an "impasse" in the bargaining.

[11] Section 9(b) of the Act authorizes the Board to determine the "unit appropriate for the purposes of collective bargaining." The Board exercises its power under this section in representation proceedings under §9 of the Act to determine

the exercise of the Board's discretionary power to make such a determination when we hold that the Union had a right to withdraw from the multi-employer unit by calling a strike against only one member of Exchange, at least to the extent that the calling of that strike did not render the lockout lawful.

The arguments against legalizing lockouts, merely because a multi-employer unit is involved, were set out by the Board itself in the *Morand* case, 91 N. L. R. B. 409, 412-415, where the Board said, *inter alia:* "In our opinion, the Act does not permit a discharge to reduce, by anticipatory action, the effectiveness of an expected strike by a labor organization. The Board has held, with judicial approval, that an employer's economic interest in preventing a strike does not justify him in engaging in conduct of the type proscribed by the Act. The fact that the expected strike may be so timed or so directed as to place severe economic pressure on the employer does not, in our judgment, remove the strikers from the protection of the Act. Strike activity, actual or threatened, is concerted activity, and concerted activity does not cease to be protected merely because it is, or may be, effective, or because it subjects the employer to

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the exclusive bargaining representative of the employees in the unit which the Board deems is appropriate.

The Board must also determine the appropriate unit for collective bargaining purposes when there is a charge by the union or employer that the other has committed an unfair labor practice under §8(a)(5) or (b)(3) by refusing to bargain in the appropriate unit.

Since the question of the "appropriate" unit is applicable only where the issue involves collective bargaining, it can have no relevance to strike activity by the union.

economic hardship. Any other view would not only be in derogation of the right of employees to engage in concerted activities but would also conflict with the express policy of the Act to minimize industrial strife. * * * Thus, if in the instant case we accepted the respondents' view * * *, we would be required to hold that a strike against one respondent * * * directly involving only about sixty of its employees, justified the other thirty-four respondents in discharging about seven hundred of their employees, even though they had not participated in the strike but had, in fact, remained at work. As stated in the brief filed on behalf of the General Counsel in support of the Intermediate Report: 'In this case, the effect of granting immunity to the discriminatory lockout by thirty-four employers, in reprisal against the strike against a thirty-fifth employer, would be to multiply the obstruction to commerce. It would set a sweeping precedent for the conversion of any single employer's dispute into an association-wide or industry-wide dispute. An isolated skirmish would become a civil war' * * * The logical corollary of the respondents' position is, therefore, that a union seeking to negotiate a contract with a group of employers, however large, must strike all or none. If it strikes less than all, its members will be deprived of the protection of the Act; if it strikes all, they will be protected.[12] We cannot give such an

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[12] The difficulty with which a union would be faced if it were placed in the dilemma set forth by the Board can easily be foreseen. For example, if a union representing automobile workers had once bargained collectively with a group representing all the automobile manufacturers, a subsequent strike against, say, the Ford Company would justify General Motors

incongruous construction to an Act designated to minimize industrial strife. * * * To hold that employees in a multi-employer unit who remain at work may be treated as strikers, solely because of a strike by other employees, would involve the introduction of a new concept in labor relations—i.e., the vicarious or constructive strike. We know of no legislative or other warrant for introducing such a concept."

Multi-employer bargaining has never received the express sanction of Congress. It would stretch the usual canons of interpretation unduly far to conclude that, in enacting the Taft-Hartley Act, Congress gave legislative approval to all the previous Board rulings concerning such bargaining.[13]

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in locking out its employees, regardless of the patent fact that the anticipation of a strike against General Motors would cause it no exceptional economic hardship.

Thus, if we were to accept the Board's reasoning in the instant case, in any case where there is a history of multi-employer bargaining, if the union wishes to call a strike, it must wait until it can afford to strike all the employees in the unit; for if it struck only one, the non-struck members of the association could lock out their employees.

[13] It may well be that Congress, in enacting the Taft-Hartley Act, did not intend to interfere with the then established practice of multi-employer bargaining built up by the Board under the Wagner Act. See Freidin, *supra*, pp. 17-34.

A review of the legislative history of the amendments to the Act discloses sharp disagreement over the desirability of multi-employer bargaining. The House Bill (H. R. 3020, 80th Cong. 1st Sess., §9(f)(1)) as passed would have prevented certification of multi-employers units unless they meet certain conditions. Comment was varied and oft-times sharply critical. See 1 Legislative History of the Labor Management Relations Act of 1947 (Gvt. Printing Office 1948) pp. 315, 325-327, 364, 377; 584, 612, 630, 636, 643, 653, 663, 672, 680, 716, 758-767, 772-775 867-868. Senators Taft, Ball, Donnell, and Jenner proposed to meet the problem by limit-

Even if we assume that it did, still the Board at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the "stability of the employer unit."[14] We think Congress must have intended that such a radical innovation be left open for consideration by the joint committee it set up under §402 of the Act to study, among other things, "the methods and procedures for best carrying out the collective bargaining process, with special attention to the effect of industry-wide or regional bargaining upon the national economy."

We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly protected, merely to effectuate a policy as to which Congress has, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the Act and a usurpation of the power of Congress. Neither the Board nor the courts may make so fundamental a change in the existing law as that which would result from the

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ing the unions eligible to act as representatives of those "composed solely of employees of one employer, or of employees employed in the same metropolitan district or county by different employers," and to further meet the problem by prohibiting an "international union from coercing a local union in the conduct of negotiations." *Id.* at 457; 2 Legislative History, 1217-1218. These proposals, which were not passed by the Senate, likewise elicited comment, favorable and unfavorable. *Id.* at 1217-1256, 1271-1302. Thereafter the proposals relating to multi-employer bargaining were eliminated in conference. 1 Legislative History 550-551.

[14] The cases concerning the question whether the non-struck employers in an association may lock out their employees after a strike against only one of the employer-members, were all decided after the passage of the Taft-Hartley Act of 1947.

Board's decision. The problems involved in legalizing the lockout in multi-employer situations are manifold, and their solution must be left to Congress.

Since the stipulated facts show no economic justification for the lockout, we hold that the lockout of non-striking employees constituted an interference with their statutory right to engage in concerted activity in violation of § 8(a)(1) of the Act, and also constituted discrimination in the hire and tenure of employment of the employees because of the Union's action, thereby discouraging memberships in the Union in violation of § 8(a)(3) of the Act.

The Board's order and decision dismissing the complaint must be set aside. The case is remanded to the Board for further proceedings in conformity with this opinion.

WATERMAN, *Circuit Judge* (dissenting):

The National Labor Relations Board decided in this case that the employer members of this multi-employer bargaining unit did not violate the National Labor Relations Act, 29 U.S.C.A. § 151 *et seq.*, by locking out their employees when the Union, following several weeks of unsuccessful contract negotiations with the group, engaged in a strike against one of the members in support of its demands against all. The Board concluded that the strike against one member "necessarily carried with it an implicit threat of future strike action against any or all of the other members of the

[multi-employer bargaining unit.]"[1] In these circumstances, and "in the absence of any independent evidence of anti-union motivation," the Board viewed the lockout as "defensive and privileged in nature, rather than retaliatory and unlawful" since it was a necessary means of protecting "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship."

I think that the decision of the Board, which accords with the views of the three Courts of Appeals that have thus far had occasion to consider the problem,[2] is a reasonable and proper construction of the Act. For the reasons set forth below, I would affirm the Board's order dismissing the Union's complaint.

1. *Not every employer interference with a legitimate concerted activity is proscribed by the Act.* Thus, an employer is permitted to replace economic strikers, even though this amounts to a limitation on free exercise of the right to strike. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333. Similarly, where special "economic or operative" problems are presented, an employer may counter a

[1] My colleagues accept this conclusion of the Board, holding that the Board reasonably inferred a threat of strike against the non-struck employers. The only important difference between the facts in this case and those in *Leonard* v. *N. L. R. B.*, 9 Cir., 197 F. 2d 435, 205 F. 2d 355, is that here the Union did not make a public announcement of its intentions.

[2] *Leonard* v. *N. L. R. B.*, 9 Cir., 197 F. 2d 435, 205 F. 2d 355; *Morand Bros. Beverage Co.* v. *N. L. R. B.*, 7 Cir., 190 F. 2d 576, 582; *N. L. R. B.* v. *Continental Baking Co.*, 8 Cir., 221 F. 2d 427, 431-432; *N. L. R. B.* v. *Spalding Avery Lumber Co.*, 8 Cir., 220 F. 2d 673, 675.

strike threat with an anticipatory lockout. *Duluth Bottling Association,* 48 N.L.R.B. 1335 (spoilage of materials); *International Shoe Co.,* 93 N.L.R.B. 907 (interruption of production); and *Betts Cadillac Olds, Inc.,* 96 N.L.R.B. 268 (inability to finish repair work). In short, where the right to strike collides with legitimate employer interests, the Act leaves to the Board the task of "working out an adjustment." *Republic Aviation Corp.* v. *N.L.R.B.,* 324 U.S. 793, at 797-798.

2. *The employers in a multi-employer bargaining unit have a legitimate and vital interest in the continuance of the established unitary system of bargaining.* In this case the eight members of the Exchange are linen supply businesses competing with each other within the Buffalo metropolitan area, and the Union represents the drivers of all Exchange members. The joinder of the employers for purposes of bargaining as a unit with the Union in such circumstances presents a familiar pattern in industrial relations.[3] It allows small employers to bargain on an equal basis with a powerful, industry-wide union, and at the same time avoids the competitive disadvantages resulting from non-uniform contractual terms.[4]

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[3] The Board, in its brief, citing Monthly Labor Review, vol. 64, pp. 398, 409 (1947), says that in 1947 there were over 5,000 multi-employer units covering some 4,000,000 employees.

[4] See, *e.g.*, Freiden, The Taft-Hartley Act and Multi-Employer Bargaining Univ. of Pennsylvania Press, 1948), p. 5; Garrett and Tripp, Management Problems Implicit in Multi-Employer Bargaining (Univ. of Pennsylvania Press, 1949), pp. 2-3; Kerr and Fisher, Multiple-Employer Bargaining: The San Francisco Experience (Univ. of California Press,

3. *The Board's accommodation of the legitimate interest of the employers in group bargaining and the right of the employees to strike in support of their demands is a reasonable and proper one.* Group bargaining benefits the union and the public as well as the employers. The union minimizes its organizational and administrative expenses; it can more readily standardize wages and other conditions of employment; and it gains security against raiding by other labor organizations.[5] Moreover, insofar as the public is concerned, the experience of the Board and many other specialists in the labor field has shown that strikes within these units tend to be infrequent, and that there is more likely to be full acceptance on both sides of the principle of resolving differences through negotiation.[6] In my judgment the decision from which I am dissenting would tend to undermine these beneficent developments and to convert industrial relations into a pattern of continuous piecemeal strife.

The Board argues that the purposes of multi-employer bargaining are to create uniform terms

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1948), pp. 27-30; Hall, Impact of the Bargaining Unit on Labor Management Relations (Second Annual Conference on Labor, N. Y. U., 1949), pp. 39-40.

[5] Kerr and Randall, Multiple-Employer Bargaining in the Pacific Coast Pulp and Paper Industry (Univ. of Pennsylvania Press, 1948), p. 9; Hall, *op. cit.* note 4 *supra*, pp. 43-44.

[6] Hall, *op. cit.* note 4 *supra*, p. 44; Kerr and Fisher, *op. cit.* note 4 *supra*, p. 40; Kerr and Randall, *op. cit.* note 5 *supra*; pp. 27-31; Bahrs, The San Francisco Employers' Council (Univ. of Pennsylvania Press, 1948), pp. 37-39; MacDonald, Bob and Sheifer, Labor Relations in Milk Distribution in the New York Metropolitan Area (Matthew Bender & Co., 1951), pp. 575-577; Hill, Teamsters and Transportation (Am. Council on Public Affairs, 1942), p. 202; Note, 65 Harv. L. Rev. 353, 355.

and conditions of employment at the plants of all employers in the unit, and to achieve on a case-by-case basis an approximate balance of power between organized labor and organized management. From the employers' point of view, the Board says, the major advantage of multi-employer bargaining is that it may give the employers sufficient bargaining power to withstand the divisive pressures of whipsawing. When a union representing all of the employees of a multi-employer group engages in a strike against one of the members of the group, even while pretending to bargain with the group as a whole, it is directly attacking an important interest of all the employers in the group—their interest in group bargaining. The Board feels that the multi-employer bargaining unit will not long survive if the nonstruck members are not permitted under such circumstances to use their countervailing force against the Union. I think we should accept the experienced judgment of the Board on such matters. The present decision will tend to destroy the equality of bargaining power and reduced incidence of strikes which have been the hallmarks of multi-employer bargaining.

Moreover, I agree with the Board that the decision of the Court will permit the Union to keep the benefits which it has derived from multi-employer bargaining, while at the same time nullifying the consideration that made such unit desirable from the employers' standpoint. That is to say that both sides gain certain benefits and accept certain restrictions when they agree to engage in multi-employer bargaining. The union

gains important organizational, raiding and standardization advantages, while the employers gain a protection against whipsawing. This decision would deprive employers of this *quid pro quo*. The Union is enabled to strike the employers one at a time without running the deterrent risks of a unit-wide strike.[7] In this situation, "the right of the employers to lock out temporarily all the employees is no more than equal to the right of the union of all the employees to call out the employees of one after another of the [employers] in the whipsawing manner above described." *Leonard* v. *N. L. R. B.*, 9 Cir., 205 F. 2d 355, 357-358.

4. *There is nothing in the Act or in its legislative history which deprives the Board of power to adjust the conflicting but legitimate interests of employers and employees in this situation.* The Act protects the rights of employees to strike in support of their demands, but this protection is not absolute. It is well settled that employers are not guilty of unfair labor practices when they act in protection of legitimate and vital interests of their own, even though such acts necessarily impinge on the concerted activity of employees. The Act is not a detailed blueprint, but a general guide; and it is

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[7] The majority decision relies heavily on the idea that the Union should be accorded the same freedom of voluntary withdrawal from a multi-employer bargaining unit as the Board has accorded to individual employers. This may be so, but in this case the Union did not seek to withdraw from the unit. It attempted to retain the advantages of group bargaining by pretending to bargain with the multi-employer group, while at the same time taking strike action against one of the members of the group.

the function of the Board to adjust the conflicting interests of employers and employees.[8]

Multi-employer bargaining is almost as old as the Act itself. The Board has established many multi-employer bargaining units pursuant to 29 U. S. C. A. §159(b), and, when established, employers and unions have the reciprocal duty to bargain in that group. 29 U. S. C. A. §158(a)(5) and (b)(3). Efforts to limit or destroy multi-employer bargaining were made in 1947, but the amended Act (the Taft-Hartley Act) left multi-employer bargaining undisturbed. I do not think it is properly inferable that Congress, by its inaction, meant to leave the question of multi-employer bargaining to be dealt with in future legislation. On the contrary, considering the long

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[8] "A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194.

history of multi-employer units, it seems more reasonable that Congress intended that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 23424

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F. OF L., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE

Before: Clark, Frank and Waterman, Circuit Judges

This cause came on to be heard upon the petition of Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL to review an order of the National Labor Relations Board dated July 26, 1954. The Court heard argument of respective counsel on October 14, 1955, and on February 14, 1956, being fully advised in

the premises, handed down its decision setting aside the Board's order and remanding the case to the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Board's order of July 26, 1954 be and it hereby is set aside and remanded to the Board for further proceedings in conformity with the Court's opinion.

(S.) JEROME N. FRANK,
Judge, United States Court of Appeals for the Second Circuit.
(S.) STERRY R. WATERMAN,
Judge, United States Court of Appeals for the Second Circuit.

FILED: March 13, 1956

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition

of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 42–55) is reported at 231 F. 2d 110. The findings of fact, conclusions of law, and order of the Board (R. 34–37) are reported at 109 NLRB 447.

JURISDICTION

The decree of the court below (R. 61) was entered on March 13, 1956. The petition for a writ of certiorari was filed on May 23, 1956, and granted on October 8, 1956 (R. 62). 352 U. S. 818. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), appear in Appendix A, *infra*, pp. 38–39.

QUESTION PRESENTED

Where employers bargain jointly in a multi-employer association with a single union which represents the employees of all, and the union supports its bargaining demands by a strike against one employer in the group, are the other employers, threatened by successive and separate strikes against themselves, forbidden by the National Labor Relations Act to close their plants until the strike is terminated?

STATEMENT

A. THE BOARD'S FINDINGS OF FACT [1]

For a period of 13 years, the eight linen supply companies located in the cities of Buffalo, Niagara Falls, and Dunkirk, New York, have bargained as a group with respondent Union, which represents the truck drivers of all eight companies (R. 35, 17). This bargaining has been conducted on behalf of the companies by the Linen and Credit Exchange, an association of which the employers are members. Under the customary procedure, after the negotiation by the Exchange and the Union of contracts of uniform application to all the companies, each of the contracts is approved and signed by the member company named in the contract (*ibid.*).

In March, 1953, the Exchange and the Union began negotiations for a new collective agreement to

[1] The underlying facts were stipulated by the parties (R. 16–20).

replace the existing contract between them, which was to expire on April 30, 1953 (R. 35; 17–18). Meetings were held during the succeeding weeks. No agreement having been reached, the Union, on May 26, 1953, struck Frontier Linen Supply, one of the members of the Exchange (R. 35; 18). A picket line was established at Frontier's plant only, and the Union members continued to work at the remaining seven companies (R. 35; 18). On the day following the strike at Frontier, however, the nonstruck members of the Exchange laid off their employees and notified the Union that operations would not be resumed until the strike at Frontier was terminated (*ibid.*).[2]

During the following week, the Union and the Exchange continued to confer on the terms of a new contract, and the strike and shutdown remained in effect (R. 35–36; 18, 20). On June 3, 1956, agreement was reached and a new contract was executed which was uniformly applicable to all members of the Exchange, including Frontier (R. 36; 20). Thereupon, the strike was called off, the nonstruck employers recalled their employees to work, and all eight companies once again began normal operations (*ibid.*).

B. THE BOARD'S DECISION

Upon the foregoing facts, the Board, Member Murdock dissenting, found that the nonstruck employers

[2] The term "lockout" has been applied to denote such a temporary layoff of employees, as distinguished from a discharge or permanent severance of the employment relationship. It is in this sense that the term is used in this brief.

were not precluded by the Act from shutting down their operations during the strike against Frontier, and therefore dismissed the complaint which charged that they had committed an unfair labor practice in violation of Section 8 (a) (3) and (1) of the Act by thus laying off their employees (R. 36–37).[3] As a factual premise for its determination, the Board found that, in view of the established practice of negotiating contracts uniformly applicable to all members of the Exchange, the strike against Frontier was in support of demands which were common as to all eight companies, and thus "necessarily carried with it an implicit threat of future strike action against any or all of the other members of the [Exchange]" (R. 36). The tactic of waging separate and successive strikes against the several employer members of a multi-employer bargaining unit was considered by the Board to be an exertion of "economic pressure to atomize the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 36). The Board concluded that the Act did not forbid the employers, in order to defend their interests in the multi-employer bargaining unit against the devisive pressures engendered by the threat of successive strikes, "and in the absence of any independent evidence of antiunion motivation," to make a common defense to the strike against Frontier and

[3] Among other relief, the Union sought compensation for these employees during the period of the shutdown.

accordingly shut down their operations during the strike (R. 36–37).[4]

C. THE DECISION BELOW

The court below sustained the Board's finding that, in the circumstances, the strike against Frontier implied that successive strikes would be waged against the remaining members of the Exchange, but, with Judge Waterman dissenting, rejected the Board's conclusion that the nonstruck members of the Exchange acted lawfully when they laid off their employees (R. 44–60). Accordingly, the court below set aside the Board's order dismissing the complaint and remanded the case to the Board for further proceedings (R. 55).

The major premise of the majority opinion below is that by striking Frontier the Union had in effect exercised its legal "right to withdraw from the multi-employer unit" (R. 52). So viewing the effect of the strike, the court below thought controlling, not the special considerations relied on by the Board relating to the interests of the nonstruck employers in their practice of group bargaining, but rather "the basic

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[4] The Board expressly limited its decision in this case to lockouts affected by the special considerations relating to multi-employer bargaining units, as distinguished from the case of a lockout by a single employer who deals separately with a union. Thus, the Board stated that the question of whether, as a general proposition, "the employer lockout is the corollary of the employees' statutory right to strike * * * [was] unnecessary to pass upon" (R. 36). See, however, the Board's subsequent decision in *American Brake Shoe Co.*, 116 NLRB No. 107 (August 28, 1956), 38 LRRM 1330, upholding unfair labor practice charges against an employer in connection with a lockout where no multi-employer bargaining unit was involved.

principle that an employer who locks out its employees on a mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (R. 45).

In addition, the court below expressed its view that Congressional treatment of multi-employer bargaining did not warrant the "extreme lengths to which [the Board] now seeks to go in order to maintain the 'stability' of the unit" (R. 54). As stated by the court (53–55):

> Multi-employer bargaining has never received the express sanction of Congress. It would stretch the usual canons of interpretation unduly far to conclude that, in enacting the Taft-Hartley Act, Congress gave legislative approval to all the previous Board rulings concerning such bargaining.
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> * * * * *
>
> We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly protected, merely to effectuate a policy as to which Congress has, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the act and a usurpation of the power of Congress. Neither the Board nor the courts may make so fundamental a change in the existing law as that which would result from the Board's decision. [Footnotes omitted.]

SUMMARY OF ARGUMENT

The court below, in holding that the Union's strike against Frontier constituted an exercise of its "right to withdraw from the multi-employer bargaining unit" (R. 52), misconceived the nature of the strike

tactic resorted to by the Union and thereby cast the question of the legality of the nonstruck employers' lockout in an inapplicable and misleading context. Both in fact and in theory, the strike against Frontier cannot be construed as a withdrawal from multi-employer bargaining. Thus, it is undisputed that the Union and the Exchange, which had been engaged in group bargaining with each other for the preceding thirteen years, continued unit-wide negotiations without interruption during the strike and eventually concluded a unit-wide agreement. Moreover, the purpose and theory of the so-called whipsawing technique which the Union initiated against Frontier was to obtain surrender by all employers in the unit to the common contract demands which continued to be sought in negotiations with the Exchange.

Accordingly, the question presented is not whether employers bargaining separately upon a breakdown of a multi-employer unit may impose lockouts in the face of a strike threat; rather, the question is whether employers who bargain as a group may, acting to preserve their group interests, treat the first of a threatened series of whipsawing strikes as a strike against all, and counter by ceasing operations until the strike is terminated.

A. It is the Board's view that the Act requires in this case an accommodation to be made of both the Union's right to strike in support of contract demands and the employers' recognized interests in preserving the unity of their group bargaining position. Cf. *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105; *Republic Aviation Corp.* v. *Na-*

tional Labor Relations Board, 324 U. S. 793; *National Labor Relations Board* v. *Mackay,* 304 U. S. 333. Upon a consideration of these competing factors, it is the Board's task to determine the "proper adjustment" to be made.

B. Group bargaining is often found advantageous by unions because it achieves standardization of wages and conditions of employment, it minimizes organizational expenses, and it affords protection against raiding activities by rival unions with respect to the employees of single employers in the unit. The overriding advantage gained by employers from bargaining as a group is an ability to present a single position backed by their united strength in bargaining negotiations. Experience has shown that a single employer, when bargaining with a union which represents both its employees and the employees of its competitors, cannot ordinarily withstand a series of whipsawing strikes, that is, successive strikes against each in turn to obtain uniform contract terms. By combining for purposes of collective bargaining, employers are enabled to avoid union exploitation of the lack of unity among themselves and to make a common defense, as in this case, against a strike which necessarily threatens the bargaining position of each. Because of these factors, the practice of multi-employer bargaining has become an established—and in many instances an essential—method by which negotiations are carried on in many thousands of industrial relationships. The practice has been successful in promoting industrial stability and fostering mature employer-union relations.

The Board has been vested with statutory authority, which it has regularly exercised under both the original and amended Act, to designate multi-employer bargaining units. All legislative attempts to restrict the practice of group bargaining have been defeated. Congress, in short, has recognized and accepted multi-employer bargaining as an established fact of industrial life. In these circumstances, it is plain that employers who engage in such bargaining have a lawful and important interest in maintaining the unity of their bargaining position, which from their point of view is indispensable to the continued practice of bargaining as a group. This interest, accordingly, must be accommodated by the Act where it conflicts with the exercise of similarly recognized rights of others.

C. Whipsawing strikes are a direct assault upon "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 36). By this tactic, unions seek to divide-and-conquer each employer in turn, the very result which employers seek to avoid by banding together for bargaining purposes. Whipsawing strikes also undermine the stabilizing effects which group bargaining has contributed to industrial relations, for stability results from the fixing of uniform contract terms, and that in turn requires all phases of the bargaining relationship to be carried on at the group level.

By ruling that the Act does not forbid a unit-wide shutdown by the non-struck employers as a defensive measure against whipsawing aimed at all employers in the unit, the Board has made a fair adjustment of

the opposing interests of the parties. The Board's decision thus preserves in multi-employer bargaining the balance in the relative strengths of the parties which the practice contemplates and is essential to its continuation. To do less would give the participating union an unfair advantage by permitting it to receive the benefits of the relationship while eliminating the advantages to employers for which they give up their independence of action when they agree to bargain as a group. At the same time, the Board's decision neither prohibits the right of unions to strike, nor permits an employer to discharge employees for supporting whipsawing strikes. In substance, the Board's determination realigns a union's risk in striking to coincide with the scope of the unit against which it seeks to enforce its demands.

ARGUMENT

IN THE EVENT OF A STRIKE AGAINST ONE EMPLOYER IN A MULTI-EMPLOYER BARGAINING UNIT, WHEN ACCOMPANIED BY A THREAT OF SUCCESSIVE STRIKES AGAINST THE OTHERS TO WIN COMMON CONTRACT DEMANDS, THE NATIONAL LABOR RELATIONS ACT DOES NOT FORBID THE NONSTRUCK EMPLOYERS TO SHUT DOWN OPERATIONS PENDING SETTLEMENT OF THE STRIKE.

INTRODUCTION

Under the National Labor Relations Act, the whipsawing tactics adopted by the Union—striking one employer in a multi-employer bargaining unit in support of contract demands covering the entire unit, and threatening successive strikes against the other members of the unit for the same purpose—constitutes a

permissible economic weapon under the Act.[5] In response to those tactics, the nonstruck members of the unit treated the strike against one member as a strike against all, and accordingly shut down operations pending settlement of the strike. It is the Board's position that such conduct does not constitute an unfair labor practice. In the Board's view, the nonstruck members of the unit were not required by the Act to wait for the Union to carry out its threat of successive strikes, one by one, until all had submitted.

The Board's position accords with the decisions of three Courts of Appeals.[6] In taking the contrary position, the court below stated that "Multi-employer bargaining has never received the express sanction of Congress" and that the Board is without authority to approve lockouts "in order to maintain the 'stability of the employer unit'" (R. 53–54). Although, as we show *infra*, pp. 20–33, the court incorrectly evaluated the recognition given in the Act to

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[5] *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 581, 582 (C. A. 7); Section 13 of the Act.

[6] *Leonard* v. *National Labor Relations Board*, 197 F. 2d 435, 205 F. 2d 355 (C. A. 9); *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 582 (C. A. 7); *National Labor Relations Board* v. *Continental Baking Co.*, 221 F. 2d 427, 431–432 (C. A. 8); *National Labor Relations Board* v. *Spalding Avery Lumber Co.*, 220 F. 2d 673, 675 (C. A. 8).

Prior to this case, a majority of the Board had interpreted the Act as precluding the nonstruck members of a multi-employer unit from imposing a lockout in the circumstances of this case. *Morand Bros. Beverage Co.*, 99 NLRB 1448; *Davis Furniture Co.*, 100 NLRB 1016. However, after further study of the problem in the light of the court decisions cited herein, the Board decided in this case that the contrary conclusion is more consistent with the applicable law and policy considerations.

the practice of multi-employer bargaining, we do not understand the court's observations in this respect to be basic to its decision. Instead, the decision appears to rest on the ground that the Union's piecemeal strike strategy constituted, as a matter of law, a withdrawal by the Union from the multi-employer bargaining unit. Thus, without any reference to supporting evidence, the court held that in striking Frontier, the Union merely exercised its "right to withdraw from the multi-employer unit" (R. 52); accordingly, the fact that the Union had bargained with the members of the Exchange as a group before the strike against Frontier could, on this analysis, furnish no justification for departing from what the court stated to be "the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (R. 45).[7]

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[7] As noted *supra*, note 4, the Board in the instant case reserved decision on the question whether lockouts are the employer's equivalent of the union's right to strike. Prior Board decisions have recognized that a suspension of operations by an individual employer is permissible in anticipation of a strike where the employer's action is prompted by a purpose to avoid exceptionally serious prospective economic loss or business disruption that a strike might bring about. See, *e. g.*, *Duluth Bottling Association*, 48 NLRB 1335; *Betts Cadillac Olds, Inc.*, 96 NLRB 268. Where, however, a lockout is prompted by a punitive or discriminatory purpose, the Board has found it to be violative of the Act. *Somerset Classics, Inc.*, 90 NLRB 1676, enforced 193 F. 2d 613 (C. A. 2); certiorari denied, 344 U. S. 816. More recently, the Board has held that an employer may not "avoid the normal consequences of a strike by anticipatory action which discriminates against employees because of their union activities or otherwise interferes with their rights under the Act." *American Brake Shoe Co.*, 116 NLRB, No. 107 (August 28, 1956), 38 LRRM 1330, 1335.

The court's analysis misconceives the nature of the strike tactic resorted to by the Union in this case and thereby casts the question of the legality of the non-struck employers' lockout in an inapplicable and misleading context. As a practical matter, the strike against Frontier cannot be construed as an effort to withdraw from the multi-employer unit, for the Union continued during the strike, as before, to negotiate with the Exchange for a unit-wide contract, and, indeed, eventually executed such a contract (*supra*, p. 3). These unit-wide negotiations followed a practice of thirteen years' duration, and nothing in the record suggests an intent on the part of the Union to depart from that practice. In short, the record makes plain, as observed in the dissenting opinion, that "the Union did not seek to withdraw from the unit" (R. 59, N. 7). On the contrary, the Union's strike against Frontier, as the Board found, was an integral part of a broader overall strategy directed against *all* employers in the unit. Whipsawing thus represents in this case an effort by the Union to retain the advantageous structure of the multi-employer unit (see *infra*, pp. 23–26) and simultaneously to undermine by a divide-and-conquer strategy the unity for which the members of the Exchange had combined in collective bargaining.[8]

[8] Accordingly, neither the correctness of Board rulings, with which the court below expresses disagreement, relating to the right of unions to terminate a multi-employer bargaining relationship, nor the authority of the Board to require unwilling unions to bargain with an employer association on the ground that it circumscribes the appropriate unit, may properly be regarded as issues in this case. The development of the Board's rulings as

Accordingly, the question presented is not whether employers who bargain separately upon a breakdown of a multi-employer unit may impose lockouts in the face of a strike threat,[9] but whether employers who bargain as a group may, acting together to preserve their group interests, treat the first of a threatened series of whipsawing strikes as a strike against all, and cease operations until the strike is terminated.[10] In the Board's view, the answer to this question turns on an evaluation and accommodation of the legitimate interests of the employers in preserving the unity of their bargaining position in the multi-employer unit, and those of the Union in engaging in piecemeal strikes to attain their objectives. We believe that the Board's decision, upholding the employers' right to shut down operations during a strike against one of them, represents a reasonable and proper adjustment of these competing interests.

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to these matters is discussed in the references cited in the opinion below (R. 49–50).

[9] Compare *Spalding Avery Lumber Company*, 103 NLRB 1516, enforcement denied, 220 F. 2d 673 (C. A. 8).

[10] The Board's inference of fact that the Union's strike against Frontier "carried with it an implicit threat of future strike action against any or all of the other members of the [Exchange]" (R. 36) was disputed by the Union in the court below. The court, however, held that the stipulated facts afforded ample basis for the inference drawn by the Board; accordingly, the Board's finding in this respect is not open to attack in this Court. *H. J. Heinz Company* v. *National Labor Relations Board*, 311 U. S. 514, 518; *I. A. M.* v. *National Labor Relations Board* 311 U. S. 72, 75; cf. *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502–503.

A. Under the Act, the legality of the shutdown in this case turns on a balancing of the legitimate interests of the employers against those of the Union

An employer's right to close his plant—or to discharge, transfer, or hire employees, or otherwise alter the tenure and conditions of their employment—is affected by the Act only insofar as its exercise impinges upon the employees' statutory right to organize and to engage in concerted activities. See *National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1, 45–46. Thus, it is settled that an employer commits no violation of the Act by suspending operations for business reasons which do not concern employee activities protected by the Act.[11] On the other hand, it is equally settled that a lockout prompted, not by business considerations, but by a purpose to defeat employee organization or other protected activities, is violative of the Act.[12]

There may frequently arise under the Act, however, an ambivalent situation in which tenure of employment is affected but which cannot be explained in terms of the foregoing distinction. Concerted activities on the part of employees may themselves give rise to business problems which, from the employer's standpoint, make a temporary shutdown or other restrictive measure desirable. In these circumstances,

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[11] See, *e. g., National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848 (C. A. 5); *National Labor Relations Board* v. *Goodyear Footwear Co.*, 186 F. 2d 913, 918 (C. A. 7); *Atlas Underwear Co.* v. *National Labor Relations Board*, 116 F. 2d 1020, 1023 (C. A. 6).

[12] See, *e. g., National Labor Relations Board* v. *Wallick & Schwalm Co.*, 198 F. 2d 477 (C. A. 3); *National Labor Relations*

protective economic action by an employer, although attributable to his legitimate business interests and not anti-union bias, may well interfere with the protected employee conduct which created the business problem. It is apparent that these situations, involving legitimate interests of both employers and employees, cannot be resolved in a frame of reference which takes into account the rights of only the one to the exclusion of the other. Rather, as this Court has recently stated with respect to this kind of problem, "Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112. See also *Republic Aviation Corp.* v. *National Relations Board*, 324 U. S. 793, 797–798.

Application of the foregoing principle has established, for example, the propriety, on the one hand, of replacing economic strikers, even though such action may obviously tend to deter employees from exercising their statutory right to strike (*National Labor Relations Board* v. *Mackay*, 304 U. S. 333, 345), and the impropriety, on the other hand, of permanently discharging such strikers (*National Labor Relations Board* v. *Buzza-Cardozo*, 205 F. 2d 889, 890 (C. A. 9), certiorari denied, 346 U. S. 923; *Morand Bros.* v. *National Labor Relations Board*, 190 F. 2d 576, 583 (C. A. 7); *National Labor Relations Board* v. *United*

Board v. *Somerset Classics*, 193 F. 2d 613 (C. A. 2), certiorari denied, 344 U. S. 816; *Olin Industries* v. *National Labor Relations Board*, 191 F. 2d 613 (C. A. 5), certiorari denied, 343 U. S. 919.

States Cold Storage Corp., 203 F. 2d 924, 927 (C. A. 5), certiorari denied, 346 U. S. 818). The same principle is also determinative in decisions which have established the limitations which employers may impose on organizational activities on company time and property. For example, employers may not abridge their employees' statutory right to organize by reason alone of the fact that it is exercised on employer premises. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 803. However, considerations of discipline, safety, and efficiency of operations, which must also be recognized as "essential elements" in a stable and mature industrial relationship, may properly warrant reasonable restrictions on such activities(*id.* at 98).[13] Similarly, the measures an employer may take in protection of his interests may also depend, where they have an inhibiting effect on organizational activities, on whether such activities are carried on by nonemployees, and whether the "inaccessibility of employees [outside the plant] makes ineffective the reasonable attempts by nonemployee [organizers] to communicate with them through the usual channels." *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112; cf. *National Labor Relations Board* v. *Stowe Spinning Co.*,

[13] See also *Boeing Airplane Co.* v. *National Labor Relations Board*, 217 F. 2d 369, 374–375 (C. A. 9); *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375 (C. A. 7); *Peyton Packing Co.*, 49 NLRB 828, 843.

336 U. S. 226. These are instances under the Act of the "common juristic situation * * * defined by Mr. Justice Holmes: 'All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.'" *United States* v. *Rumely*, 345 U. S. 41, 43–44.

Applying the same principle, the Board has held that threatened strikes, as in this case, may be countered by lockouts where particular circumstances give special weight to the employers' competing interests. For example, the Board has ruled that a suspension of operations is permissible in anticipation of a scheduled strike where spoilage of materials would otherwise result (*Duluth Bottling Association*, 48 NLRB 1335, 1336, 1359–1360); that there may be a shutdown because of the difficulties of planning production in the face of prospective recurrent work stoppages (*International Shoe Co.*, 93 NLRB 907); and that a lockout may be imposed where, because of a union's refusal to promise sufficient advance notice of a threatened strike, new repair work could not be taken with assurance that it would be finished and returned to customers (*Betts Cadillac Olds, Inc.*, 96 NLRB 268).[14] In these cases, because of the special circumstances described, a temporary shutdown of operations was a reasonable and necessary step for the avoidance of unusual economic losses or operative

[14] See also *Associated General Contractors*, 105 NLRB 767.

problems beyond the ordinary loss of business or customers that may be incidental to any strike;[15] at the same time, the permitted shutdown did not abrogate the right to strike.

The instant case requires a similar "determination of the proper adjustment" between competing employer-employee rights and interests—a task which primarily "rests with the Board." *National Labor Relations Board* v. *Babcock & Wilcox Co., supra,* at 112. As already pointed out, the tactic of piecemeal strikes against employers in a multi-employer bargaining unit to win common objectives is a permissible economic weapon available to unions under the Act.[16] In countering these tactics by a unit-wide shutdown, the nonstruck employers in this case, as the Board found and the court below tacitly assumed, were not prompted by "anti-union motivation" but rather by a purpose to protect "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 36). Accordingly, decision here turns first upon an evaluation, under relevant statutory criteria, of the interests of both the nonstruck employers and the Union, and then upon a proper balancing of these interests in order properly to accommodate each under the regulatory provisions of the Act.[17]

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[15] Compare *American Brake Shoe Co.*, 116 NLRB No. 107 (August 28, 1956), 38 LRRM 1330.

[16] *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 581, 582 (C. A. 7).

[17] For an informative discussion of the question presented by this case, see Koretz, *Legality of the Lockout*, 4 Syracuse L. Rev. 251, and the *Lockout Revisited*, 7 Syracuse L. Rev. 263. See also

B. As parties to a multi-employer bargaining unit, the nonstruck employers possessed a legitimate interest, recognized by the Act, in maintaining the unity of their bargaining position

1. The practice of bargaining between an employer group and the union representing the employees of each member of the group has become a fixed and accepted practice in many industries. To upset the premises upon which it has developed and operates would be to disrupt the basis of union-employer relationships in a significant portion of American industry. Thus, the unit in which the Exchange and the Union had bargained for thirteen years is but one of an estimated 5000 to 6000 such metropolitan-wide bargaining units throughout the country.[18] A recent study of major collective bargaining agreements covering approximately 9 million workers shows that "About a third of the agreements, covering over two-fifths of the workers [nearly 4 million employees], were negotiated by multi-employer groups."[19] The growth of this practice did not, of course, take place overnight; indeed, group bargain-

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Note, 20 U. Chi. L. Rev. 299; Jones, *the National Labor Relations Board and the Multi-employer Unit*, 5 Labor Law Journal (C. C. H., Jan., 1954), p. 34.

[18] Monthly Labor Review, vol. 64, pp. 397, 409 (Bureau of Labor Statistics, 1947); Hall, *Impact of the Bargaining Unit on Labor Management Relations* (Second Annual Conf. on Labor, N. Y. U., 1949), p. 39.

[19] Monthly Labor Review, vol. 79, p. 805 (Bureau of Labor Statistics, July, 1956).

ing has its origins in the latter part of the nineteenth century, and has since advanced steadily to this day.[20]

In some instances, bargaining on the basis of employer groupings is regarded as the only practical way in which any bargaining can be carried on. In its report on the West Coast Maritime Industry, for example, the Joint Committee on Labor-Management Relations observed that multi-employer bargaining "appears to have been both a necessity and a logical development from the practical economic factors governing [that] industry."[21] Similarly, the prevalence of large numbers of competing employers within the same geographical area, each with relatively few employees represented by the same local union, as in this case, often makes independent negotiations and contracts impractical, if not impossible.[22] More gen-

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[20] Monthly Labor Review, vol. 64, p. 397 (Bureau of Labor Statistics, 1947); Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), p. 197. See also Barnett, *National and District Systems of Collective Bargaining in the United States*, Quarterly Journal of Economics, XXVI, May, 1912.

[21] This Committee was established by Section 401 of the Labor-Management Relations Act of 1947 and was directed to study and report, *inter alia*, on "the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industrywide or regional bargaining upon the national economy." Section 402 (6). The report on the West Coast Maritime Industry was the only study published by the Committee relating to multi-employer bargaining.

[22] In a study of collective bargaining practices in the trucking industry, it was pointed out that in the New York area alone there are approximately 4,600 employers employing some 52,000 truck drivers, and observed that "If employers really want any representation in collective bargaining, they have to get that participation through some group * * * it isn't a question of this or that type of bargaining—but it is merely a question of multi-employer

erally, however, multi-employer bargaining has grown simply because parties engaged in separate negotiations have become convinced that it offers a more satisfactory method for dealing with one another. Variance in the circumstances of the industries involved has led to like variety in the geographical extent of the groupings, the formality of the employer organizations upon which the bargaining unit is based, and the range of subject matter covered in the contracts.[23] However, both in terms of frequency and number of employees involved, clearly the most important type of multi-employer bargaining is practiced, as in this case, between a group of competing employers within a local metropolitan area and the union which represents their employees.[24]

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bargaining or no bargaining at all." Kaplan, *Negotiating Problems of the Trucking Industry* (Conference on Industry-Wide Bargaining, Univ. of Pa., 1948), p. 87. See also Feinsinger, *Collective Bargaining in the Trucking Industry* (Industry-Wide Collective Bargaining Series, Univ. of Pa., 1949), pp. 31–38. Over 80 percent of the employees in the trucking industry are covered by multi-employer bargaining agreements. *Collective Bargaining Structures: The Employer Bargaining Unit*, B. L. S. Report No. 1 (Bureau of Labor Statistics, 1953), p. 8. See also the testimony of A. G. Roth, President of the National Federation of American Shipping, before the Senate Labor Committee. Hearings on Amendments to the National Labor Relations Act, S. Comm. on Labor and Public Welfare, 80th Cong., 1st Sess., p. 623.

[23] See Chamberlain, Collective Bargaining (McGraw-Hill, 1951), pp. 165–170; Monthly Labor Review, vol. 64, p. 397 (March, 1947).

[24] *Collective Bargaining Structures: The Employer Bargaining Unit*, BLS Report No. 1 (Bureau of Labor Statistics, 1953), p. 1; Monthly Labor Review, vol. 64, p. 397; Bachman, *Multi-Employer Bargaining* (N. Y. Uni. Institute of Labor Relations and Social Security, 1951), pp. 8, 56–57; Pierson, *Multi-Employer Bargaining, Nature and Scope* (U. of Pa. Press, 1948), p. 39.

The use of group bargaining provides advantages to unions and employers alike. Thus, small employers may decide to band together to defend against being left with no choice but to accept pattern-setting contracts—that is, agreements by a large employer in the industry which they had no voice in negotiating, but which they are under economic pressure to adopt.[25] Unions, on the other hand, frequently urge group bargaining because they are thereby assured of standardization of wages for the employees they represent, a traditional trade union objective.[26] Similarly, a union's organizational expenses are likely to be minimized where it may gain representation rights by obtaining the support of a majority of the employees throughout a multi-employer unit rather than a majority of those who work for each employer; by the same token, the union gains security against raiding by outside organizations.[27] Operating to the advantage of both unions and employers are such considerations as the convenience of having but one set of

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[25] Lester, *Reflections on the 'Labor Monopoly' Issue* (Dept. of American Studies, Amherst College, 1950), p. 40; Taylor, *Public Interest in Establishment of Standard Employment Terms* (Conference on Industry-Wide Collective Bargaining, Uni. of Pa., 1948), p. 20.

[26] See, *e. g.*, Kerr and Randall, *Mupltiple Employer Bargaining in the Pacific Coast Pulp and Paper Industry* (U. of Pa., 1948), p. 10; Kerr and Fisher, *Multiple Employer Bargaining: The San Francisco Experience* (U. of Calif., 1948), p. 40; Hall, *Impact of the Bargaining Unit on Labor Management Relations* (Second Annual Conference on Labor, N. Y. U., 1949), pp. 29, 43–44.

[27] See authorities cited in n. 26, *supra*. See also Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), pp. 184–185; Committee Print, 82d Cong., 1st Sess., *Factors In Successful Collective Bargaining*, p. 30.

negotiations to prepare for and one contract to administer. Participation in group bargaining also makes available greater resources to aid in fact-finding, research, and other aids to negotiation, and frequently tends to enhance responsibility in bargaining.[28]

The significance of these factors, although important, is nonetheless overshadowed by the importance of still another consideration—the inability of a single employer bargaining for himself, where the employees of a number of small competing employers are represented by the same union, to cope with the threat of whipsawing strikes. Thus, absent a multi-employer unit, experience has demonstrated that ordinarily small employers, such as those in this case, simply do not possess any measure of equality of bargaining strength with a union speaking for all of their employees. The weakness in the employers' position, in such a case, has been pointedly stated in a description of the circumstances which led to the organization of an employer association in San Francisco for the purpose of carrying on multi-employer bargaining.[29]

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[28] Williamson and Harris, *Trends in Collective Bargaining, A Summary of Recent Experience* (Twentieth Century Fund, 1945) pp. 233–234; Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), pp. 184–185; Garrett and Tripp, *Management Problems Implicit in Multi-Employer Bargaining* (Uni. of Pa., 1949), pp. 2–3. See also Kerr and Fisher, and Kerr and Randall, cited in n. 26, *supra*.

[29] Bahrs, *The San Francisco Employer's Council* (Industry-Wide Collective Bargaining Series, Univ. of Pa., 1948), pp. 18–19.

> Under such circumstances the unorganized employer has no bargaining strength whatever when he acts alone. The union submits its demands. If the lone employer does not accede he is closed by a strike. The union diverts his employees to other jobs. If this cannot be accomplished a small strike assessment on those continuing at work can finance the strikers indefinitely. The employer's competitors get his business. Striking employees are at work elsewhere. The employer is soon the forgotten man. He has two choices—to submit to the demands or to go out of business.

Successive utilization of these tactics against all employers converts industrial relations into a pattern of piecemeal strife designed to bring one employer after another into line with the most favorable conditions exacted by the union from any one employer.[30]

Organization into associations for the purpose of taking a unified bargaining position has afforded such employers, when caught in this situation, a means of effectively defending against such union tactics. By negotiating as a group and presenting a common front on bargaining issues, employers are better able to obtain uniform provisions with respect to wages and conditions of employment, and thus prevent union

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[30] It has been observed that the process described above may operate in reverse in a depressive market situation or where a union is weak and cannot afford to strike. Thus, one of a group of competing employers may cut wages below the prevailing rate, thus forcing the others to do likewise or suffer a competitive disadvantage. See Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), pp. 172–174; Williamson & Harris, *Trends in Collective Bargaining, A Summary of Recent Experience* (Twentieth Century Fund, 1945), p. 233.

exploitation of differences among them. And where the union determines to initiate whipsawing strikes in support of its demands, the employers are in a position, as in this case, to take common action to preserve the unity which is the purpose of bargaining as a group. The equality of strength between the parties essential to successful bargaining is thus restored.[31] In short, the evolution and practice of group bargaining among competing employers whose employees are represented by a single union may be explained in substantial measure in terms of an effort by the employers to standardize employment conditions in their plants and to avoid the divisive and harmful effects of whipsawing.[32]

As might be inferred from the foregoing, experience has shown that multi-employer bargaining is not uni-

[31] See *American Communications Association* v. *Douds*, 339 U. S. 382, 401.

[32] See, *e. g.*, Freidin, *The Taft-Hartley Act and Multi-Employer Bargaining* (Univ. of Pa., 1948), pp. 4–5; Garrett and Tripp, *Management Problems Implicit in Multi-Employer Bargaining* (Univ. of Pa., 1949), pp. 2–3; Kerr and Fisher, *Multiple Employer Bargaining: The San Francisco Experience* (Univ. of Calif., 1948), pp. 27–30; Hall, *Impact of the Bargaining Unit on Labor Management Relations* (Second Annual Conference on Labor, N. Y. U., 1949), pp. 29, 39–40; Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), p. 172; Climer, *Management Experience in the Rubber Industry* (Conference on Industry-Wide Collective Bargaining, Univ. of Pa., 1948), p. 5; Wolman, *Industry-Wide Bargaining* (Foundation for Economic Education, 1948), p. 41; Witte, *Economic Aspects of Industry-Wide Collective Bargaining* (Dept. of American Studies, Amherst College, 1950). Note also the statement of the Court of Appeals for the Ninth Circuit: "Congress, in permitting small employers to strengthen their positions by joining multi-employer associations, undoubtedly had in mind the power of large unions to coerce these less financially able small employers." *Leonard* v. *National Labor Relations Board*, 197 F. 2d 435.

versally adaptable to all bargaining relationships. It has been experimented with on some occasions, and then abandoned, and has been utilized scarcely at all in some industries.[33] It predominates, however, in many industries characterized, as the business involved in this case, by numerous small employers.[34] Where the practice has become accepted, available evidence indicates that the result has been a facilitation of the bargaining process and an aid to the maintenance of industrial peace.

Thus, group bargaining in these instances holds not only the advantages to the participants which have been described (pp. 23–24, *supra*) but also serves the public interest as measured in terms of the Act's declared policy of promoting industrial stability and peace. Strikes have tended to be infrequent within these units; stability of the industrial relationship has been a marked characteristic of multi-employer bargaining.[35] It has also been observed that under multi-employer bargaining "wage decisions are likely to be more sensible and far sighted, taking into consideration the economic interests of the industry as a

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[33] Monthly Labor Review, vol. 79, p. 807, Table 3 (July, 1956); *Collective Bargaining Structures: The Employer Bargaining Unit*, BLS Report No. 1 (Bureau of Labor Statistics, 1953), p. 8; Climer, *Management Experience in the Rubber Industry* (Univ. of Pa., 1948), p. 5; Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), pp. 186–190.

[34] See authorities cited in n. 24, *supra*.

[35] Monthly Labor Review, vol. 64, p. 397 (Bureau of Labor Statistics, 1947); Zorn, *Multi-Plant and Multi-Employer Bargaining* (Sixth Annual Conference on Labor, N. Y. U., 1953), p. 385, 401; *Causes of Industrial Peace, Final Report* (National Planning Association, 1953), pp. 11, 18; Kerr and Fisher, *Multiple*

whole,"[36] and that such bargaining "often promoted the introduction of labor saving devices in a sane 'staggered' manner to cushion, or entirely offset, injurious social consequences of mass layoffs and discharges."[37] These are characteristics of a mature bargaining relationship—a relationship in which employers fully accept the unionization of their employees, and in which unions genuinely seek a resolution of differences through negotiation rather than on the picket line.

2. The practice of group bargaining as we have described it has always enjoyed a solid legal basis in the provisions of the Act. Under the Wagner Act, the Board's "broad discretion to determine appropriate [bargaining] units" (*Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U. S. 485, 491) encompassed authority to designate units coextensive with employer associations. *National Labor Relations Board* v. *Lund,* 103 F. 2d 815, 819 (C. A. 8); *Shipowners' Association of the Pacific Coast,* 7 NLRB 1002, 1024–1025. Accordingly, from the early days in the administration of the Wagner Act, the

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Employer Bargaining: The San Francisco Experience (Institute of Industrial Relations, Univ. of Calif., 1948), p. 53; Kerr and Randall, *Multiple Employer Bargaining in the Pacific Coast Pulp and Paper Industry* (Institute of Industrial Relations, Univ. of Pa., 1948), pp. 27–31; Witte, *Economic Aspects of Industry-Wide Collective Bargaining* (Department of American Studies, Amherst College, 1950), pp. 50–51.

[36] Lester and Robie, *Wages Under National and Regional Collective Bargaining: Experience in Seven Industries* (Department of American Studies, Amherst College, 1950), p. 93.

[37] Williamson and Harris, *Trends in Collective Bargaining, A Summary of Recent Experience* (Twentieth Century Fund, 1945), p. 233.

Board designated such units where they would best "insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise * * * effectuate the policies of [the] Act." Section 9 (b) of the Wagner Act.[38] Much of the impressive growth of group bargaining, as thus sanctioned by the Board, occurred in the years immediately preceding the adoption of the 1947 amendments to the Act.[39]

Relevant portions of the legislative history of the 1947 amendments to the Act make clear, as the court below concedes, "that Congress, in enacting the Taft-Hartley Act, did not intend to interfere with the then established practice of multi-employer bargaining" (R. 54, n. 13). The merits of this practice, as a matter of fact, were debated more extensively both in committee hearings and on the floor of Congress than perhaps any other single topic.[40] In the main, controversy ranged over whether the advantages of group bargaining in terms of industrial stability were outweighed by an adverse effect on free competition

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[38] The first such designation was in *Shipowners' Association of the Pacific Coast*, 7 NLRB 1002. For subsequent cases, see the Fourth, Fifth, Sixth, and Seventh Annual Reports of the Board, pp. 93, 69, 68–69, and 61–62, respectively (Gov't Printing Office).

[39] Monthly Labor Review, vol. 64, pp. 397, 406–407, 410.

[40] See, *e. g.*, Hearings on Amendments to the National Labor Relations Act, House Committee on Labor and Public Welfare, 80th Cong., 1st Sess. (1947), pp. 350–353, 548, 552–555, 585, 667, 1073, 1552, 1777–1780, 2187, 2214–2215, 2285, 2336, 3024; Hearings on Amendments to the National Labor Relations Act, Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess. (1947), pp. 206–223, 256–258, 391–393, 427–428, 842–843, 1012–1017, 1162–1165, 1594, 2018–2019, 2311–2314, 2370–2371; 93 Cong. Rec., pp. 4030–4031, 4133–4134, 4442–4448, 4578–4587, 4675–4676.

which critics feared would result from establishing uniform wages and conditions of employment."[41]

The House bill contained provisions which would have prohibited industry-wide bargaining except, as here, where a group of small employers were located within the same geographical area. H. R. 3020, Section 2 (16), 9 (f) (1) and 12 (3) (a), 80th Cong., 1st Sess. See H. Rep. No. 245, 80th Cong., 1st Sess., pp. 8–9, 24, 35–36. On the other hand, the Senate bill, as reported, expressly recognized the right of the Board to certify multi-employer bargaining units where "such employers have voluntarily associated themselves together for the purposes of collective bargaining." S. 1126, Sec. 2 (2), 80th Cong., 1st Sess. Thereafter, an amendment to the Senate bill was proposed on the floor of the Senate which would have prevented certification of a union as bargaining representative of the employees of more than one employer, with an exception, similar to that in the House bill, relating to situations where such employees were "employed in the same metropolitan district or county by different employers"; the proposed amendment would also have allowed local unions which bargained in multi-employer units to withdraw from such units and make separate settlements with the employer whose employees it represented. 93 Cong. Rec. 4442. During the floor debate on this proposal, its proponents made explicitly clear that they understood the existing law to permit multi-employer bargaining even on a nation-wide scale, and that their

[41] See references cited in n. 40, *supra*.

amendment, although rendering a union representing employees of many widespread employers ineligible for Board certification, would not make such bargaining practices illegal, 93 Cong. Rec. 4030, 4443–4447, 4578, 4586, 4675. The proposal, however, was defeated (93 Cong. Rec. 4676), and the conference agreement which subsequently became law also eliminated the restrictions on multi-employer bargaining contained in the House bill (H. Cong. Rep. No. 510, 80th Cong., 1st Sess., pp. 46–47). The conference agreement in addition omitted the language in the Senate bill which recognized the Board's practice of certifying multi-employer units. This was done for the express reason that the language in question "merely restates the existing practice of the Board in the fixing of bargaining units containing employees of more than one employer, and it is not thought that the Board will *or ought* to change its practice in this respect." H. Cong. Rep. No. 510, 80th Cong., 1st Sess., p. 32 (emphasis added). In sum, all attempts to restrict multi-employer bargaining were defeated when the Act was amended in 1947, and Congress indicated its approval of the continuation of such bargaining, particularly in the situation (as in this case) where the employers are located in the same metropolitan area. Accordingly, in the years since 1947, the Board has continued to designate multi-employer units when shown to be appropriate.[42]

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[42] See, *e. g.*, 14th, 15th, and 16th Annual Reports of the Board (Gov't Printing Office), pp. 36–37, 47–48, and 102–104, respectively. See also *Associated Shoe Industries*, 81 NLRB 224, 228–229, 235, n. 28.

Congressional acceptance of group bargaining, moreover, is made all the more meaningful in the light of its long history which pre-dates the Wagner Act, the evidence of its successful operation in facilitating collective bargaining and promoting industrial stability, and the need for it in some industries if there is to be in any real sense bargaining at all (*supra*, pp. 20–28). Multi-employer bargaining is thus a clear instance of "the philosophy of bargaining as worked out in the labor movement in the United States" which the Act has absorbed and sanctioned. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 408, quoting from *Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346.

The decision below would largely reject the foregoing considerations in determining whether the nonstruck employers in this case possessed a defensible interest in their common bargaining position. Because of the absence of Congressional attention to the precise problem of lockouts by employers in multi-employer units as a counter-measure to whipsawing strikes, the court below characterized the Board's decision as a "usurpation of the power of Congress" with respect to "a policy as to which Congress has, as yet, expressed no clear opinion" (R. 55). But, as Judge Waterman succinctly stated, "The Act is not a detailed blueprint, but a general guide; and it is the function of the Board to adjust the conflicting interests of employers and employees" (R. 59). This Court has never doubted the Board's power to make such adjustments where the exercise of employee rights conflicts with employer rights which may not

be ignored in administering the Act, even though their existence is implied rather than express. See cases cited pp. 16–17, *supra;* cf. *Phelps-Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 194. It is, accordingly, enough for determination in this case that Congress has recognized and accepted multi-employer bargaining as an established fact of industrial life. This much we have shown. And from this showing it follows that employers in multi-employer bargaining relationships have a lawful and meaningful interest in maintaining the unity of their bargaining position which, from their point of view, is the overriding reason for, and an indispensable factor in, the group bargaining practice. No less than the interests preserved by the Act in keeping a business running, maintaining plant discipline, and excluding non-employees from employer property (*supra,* pp. 16–17), the interest of the employers in this case in the proper functioning of their bargaining unit must be accounted for under the Act when it conflicts with union activity.

C. The Board has made a fair and reasonable accommodation between the interests of the employers in maintaining the unity of their bargaining position within the unit and those of the Union in striking in support of contract demands

Nullifying the employers' right to defend against a whipsawing strike by means of a unit-wide shutdown not only forfeits their principal stake in multi-employer bargaining (see *supra,* pp. 24–26) but destroys as well the basis for the stabilizing effect which group bargaining has contributed to industrial re-

lations. The mutual responsibility that has attended group bargaining relationships is a concomitant of maintaining all phases of the relationship at the group level, including the fixing of uniform terms of employment for all. This can be accomplished only where there is relative equality of strength between the parties, *i. e.*, where the common program of the employees, presented on their behalf by their union and backed by their combined strength, may be met by a common position of the employers involved (*supra,* pp. 25–26).

Such an alignment of strengths simply reflects that which the Act plainly contemplates as essential to collective bargaining when it protects the right of the employees of a single employer to organize for purposes of dealing with him. Where employees of more than one employer are so organized to obtain common conditions of employment, then by the same token effective bargaining may well require that such employers pool their economic strength to preserve the equation in the relationship. "A negotiatory association is to the employer the nearest counterpart of what the union is to an employee."[43] Such a balance of forces enables both agreements and contests between the parties to be of unit-wide scope. As shown *supra,* pp. 27–28, the risk of resort to economic action thereby becomes more serious to both parties, and experience has proven that responsible negotiations tend to replace strikes as a means of resolving differences. Unless, however, whipsawing strikes can be opposed by the united action of employers in such

[43] Williamson and Harris, *Trends In Collective Bargaining* (1945), p. 26.

bargaining units, the equality of strength between the parties, and the purpose of achieving unit-wide agreement are subverted, and thereby the entire concept of multi-employer bargaining is aborted."[a]

We submit that the accommodation made by the Board—allowing a strike against a single employer in a multi-employer bargaining unit to be met by a unit-wide shutdown—is both fair and reasonable, and a permissible exercise of its statutory authority. The Board's ruling simply places the parties in the position which is contemplated by the underlying nature of multi-employer bargaining, preserving to each the advantages and disadvantages that the relationship presupposes. By contrast, the decision below, as noted in Judge Waterman's dissenting opinion, permits a union "to keep the benefit which it has derived from multi-employer bargaining, while at the same time nullifying the consideration that made such unit desirable from the employers' standpoint." As explained more fully by Judge Waterman (R. 58–59):

> That is to say that both sides gain certain benefits and accept certain restrictions when they agree to engage in multi-employer bargaining. The union gains important organizational, raiding and standardization advantages, while the employers gain a protection

[a] There is general agreement among the commentators on this score. See, *e. g.*, Note, 66 Harv. L. Rev. 886, 896; Note 20 U. of Chi. L. Rev., 299, 304; Note, 42 Va. L. Rev. 684, 686; Note, 43 Geo. L. J. 426, 428; Note, 50 NW. L. Rev. 240, 243–244. The opinion of the Ninth Circuit in *Leonard* v. *National Labor Relations Board*, 197 F. 2d 435, at 437, similarly states that, subjected to unrestricted whipsawing, the employers' "unit power of collective bargaining would be impaired and ultimately the organization itself destroyed."

> against whipsawing. [The decision of the majority] would deprive employers of this *quid pro quo*. The Union is enabled to strike the employers one at a time without running the deterrent risks of a unit-wide strike.[45]

This *quid pro quo*, it may be added, is of particular importance to small employers (see *supra*, pp. 21, 23) who are frequently dependent on group bargaining for any measure of bargaining power.

Of equal importance with giving fair recognition to employers' interests is the accommodation made by the Board's ruling of unions' right to strike. It bears emphasis that this important statutory right is preserved. Nor does the Board's decision in this case permit the employer members of a multi-employer unit to discharge employees who engage in whipsawing strikes, a penalty incommensurate with the protection of the employer interest in preserving the group bargaining unit. *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 583 (C. A. 7). A temporary unit-wide lockout does no more than realign a union's risk in striking to coincide with the scope of the bargaining unit with respect to which it negotiates and attempts to enforce its demands. This much, as we have shown, is essential to the effectuation of the purpose of group bargain-

[45] The advantages to unions of bargaining in a multi-employer unit have been more fully discussed at pp. 23–24, *supra*. It may also be noted that, when employers agree to bargain in a multi-employer unit, the union is protected against the risk of being decertified or repudiated as the bargaining representative by employees on the basis of a single employer unit. Nonetheless, as pointed out in the text, immunization of a strike against a single employer in the unit from a unit-wide lockout eliminates the principal advantage to employers to engage in group bargaining.

ing. The relative equality of strength of the parties' positions is maintained at the level established by the bargaining unit. Thus, the Board's decision here implements the theory and practice of multi-employer bargaining by permitting employers to treat a strike against one of their number, a strike designed to enforce a demand against all, as a strike against all. See *Leonard* v. *National Labor Relations Board*, 205 F 2d 355, 357–358 (C. A. 9). And, on the other hand, the strike weapon is qualified only as to the scope of the shutdown it may entail, thereby preventing the strikers from acting "without regard to any duty which the existence of rights in others may place upon [them]." *Republic Aviation* v. *National Labor Relations Board*, 324 U. S. 793, 798.[46]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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DECEMBER, 1956.

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[46] See Koretz, *The Lockout Revisited*, 7 Syracuse L. Rev. 263, 268–271.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the

purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * *

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR TRUCK DRIVERS LOCAL UNION NO. 449 IN OPPOSITION

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BRIEF FOR TRUCK DRIVERS LOCAL UNION NO. 449 IN OPPOSITION

Opinion Below

The opinion of the Court below (B. A. 17-41) is not yet reported. The findings of fact, conclusions of law, and order of the Board (J. A. 22-32, 38, 41) are reported at 109 N. L. R. B. 447.

Jurisdiction

The judgment of the Court below was entered on March 13, 1956 (B. App. 40-41). The jurisdiction of this Court is

invoked under 28 U. S. C. 1254[1] and Section 10 (e) of the National Labor Relations Act, as amended.

Questions Presented

(1) Whether the Court below properly found that employers who lockout their employees because fellow union members are on strike at another plant violate Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended?

(2) Whether the Court below properly found that this illicit conduct on the part of the individual employers is not made licit by joining a multi-employer group?

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), appear in Appendix B to the Board's Petition (B. A. 41-42).

Statement

Linen and Credit Exchange is an unincorporated association composed of eight corporations, engaged in furnishing, supplying and servicing industrial and commercial enterprises with cotton and linen towels, uniforms and related items. The Exchange and seven of the corporations were named as respondents in the action before the Board. The eight corporations have been members of the Exchange for some 13 years during which time each recognized Local 449 as the exclusive bargaining representative for their respective employees, employed as truck drivers (J. A. 25).

The activities of the Exchange and its members are located in Buffalo and certain other communities in the western part of the State of New York (J. A. 24).

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[1] "B. A." references are to the appendix to the Board's brief. "J. A." references are to the joint appendix to the briefs in the Court below. "R." references are to the pages of the record printed in the joint appendix.

Negotiations of the terms of the collective bargaining agreements were worked out by representatives of the Exchange and Local 449 and then submitted to the membership of the Exchange and Local 449 for majority approval. When majority approval was given, the agreement was signed by each member of the Exchange and by the Secretary-Treasurer and Business Agent for Local 449 (J. A. 25, R. 33).

In accordance with the then existing agreement, Local 449, 60 days prior to the expiration date, gave notice of a desire to change the agreement. Negotiations for a new agreement began some time in March 1953 between the Exchange acting on behalf of its members, and Local 449 on behalf of the truck drivers. The negotiations continued off and on until May 26, 1953 at which time the truck drivers at Frontier Linen Supply Co., a member of the Exchange, went on strike and established a picket line. That evening, the Exchange and Local 449 had a meeting and during that meeting and at one or two subsequent meetings, the non-struck employers told the representative of Local 449 that their employees were locked out because of the strike at Frontier, and that if Local 449 would withdraw its picket line and cease the strike at Frontier, they (the non-struck employers) would permit their employees to return to work (R. 26, 27). On May 27th, the seven non-struck employers locked out their employees. It was stipulated that:

> "The employees referred to in Paragraph VIII of the Complaint were laid off for the reason that their bargaining representative, Local 449, had engaged in a strike at the Frontier Linen Supply, Inc., Buffalo, New York, also a member of the Linen and Credit Exchange, the bargaining representative for all of its employer members" (J. A. 15; R. 18).

2. The Board's Decision: The trial examiner, based on the facts, concluded as a matter of law that the non-struck employers had discriminated against their employees, in regard to hire and tenure of employment to discourage membership in the Union, and thereby engaged in an unfair labor practice proscribed by Section 8(a)(3) and (1) of the Act (R. 30). The trial examiner noted that the instant case "resembles skeletally the much litigated *Morand and Davis* cases,[2] i.e. multi-employer bargaining with the Union through an employer association; a strike by the Union against one member of the Association; a lockout and lay-off of employees by the other members (R. 27). On closer scrutiny he observed that there was absent in the instant case, "facts which were accorded great, if not crucial significance at various stages of the Davis-Morand ligation *(ibid)*". The Board upon the facts decided, with member Murdock dissenting:

> "in these circumstances we think the more reasonable inference is that, although not specifically announced by the Union, the strike against the one employer necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association. For the Union's action represents a familiar technique of exerting economic pressure to atomize the employer solidarity which is the fundamental aim of the multi-employer relationship • • • Therefore, and in the absence of any independent evidence of antiunion motivation, we find that the action in shutting their plants until termination of the strike at Frontier was defensive and privileged in nature, rather than retaliatory and unlawful" (J. A. 40; R. 46).

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[2] Morand Brothers Beverage Co., 91 N. L. R. B. 409; 190 F. 2d 576 (C. A. 7); 99 N. L. R. B. 1448 (on remand); 204 F. 2d 529 (C. A. 7). Leonard *et al.*, d/b/a Davis Furniture Co., 94 N. L. R. B. 279; 197 F. 2d 435 (C. A. 9); 100 N. L. R. B. 1016 (on remand); 205 F. 2d 355 (C. A. 9).

The Board's language while seeming to say that by joining a multi-employer association an employer obtains the right to lockout its employees to preserve the solidarity of such association then states as its reasoning, inconsistently at best, that:

> "* * * a strike by employees against one employer member of a multi-employer bargaining unit constitutes a threat of strike action against the other employers, which threat, *per se*, constitutes the type of economic or operative problem at the plants of the non-struck employers which legally justifies their resort to a temporary lockout of employees" (J. A. 41; R. 46).

3. The decision of the Court of Appeals—The Court of Appeals, with Judge Waterman dissenting, decided that the employees were engaged in "concerted activities" for "their mutual aid or protection" guaranteed by Section 7; and citing from a host of decisions, held "that the right to strike and to support a strike constitutes 'concerted activity'" is so protected. Interference with this right by the employer constitutes a violation of 8(a)(1), and the lockout prompted as it was by a purpose to defeat employee organization or otherwise protected concerted activities is violative of the Act. Such a lockout also violates 8(a)(3) of the Act (B. A. 20, 21).

The Court then noted that "the Board, in its brief, concedes as it must the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (B. A. 21). The Court noted those cases in which the Board had found justification for this otherwise illegal activity. The cases noted (B. A. 21) were unusual ones involving extreme economic hardship.

The Court found that:

> "The stipulated facts show no economic justification for the lockout * * *" (B. A. 33).

The Court noted that multi-employer bargaining had never received the express sanction of Congress (B. A. 31) but even if it be assumed that Congress gave legislative approval to prior Board rulings relative to such bargaining, "the Board at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the 'stability of the employer unit' ". Such radical innovations might stem from the study of the joint committee it set up under Section 402 of the Act to study among other things, "the methods and procedures for best carrying out the collective bargaining process, with special attention to the effect of industry wide or regional bargaining upon the national economy".

The Court then stated:

> "We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly protected (Sections 7 & 13) to effectuate a policy (preserving the solidarity of multi-employer groups for employers) as to which Congress has, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the Act and a usurpation of the power of Congress. Neither the Board nor the Courts may make, so fundamental a change in the existing law as that which would result from the Board's decision. The problems involved in legalizing the lockout in multi-employer situations are manifold, and their solution must be left to Congress".

Reasons for Denying the Writ

The Board would have it that the decision below is in conflict with that of the Ninth Circuit in *Davis Furniture*

v. National Labor Relations Board, 197 F. 2d 435, 205 F. 2d 355.

The Court below merely disagreed with certain *reasoning* of the Ninth Circuit ("We think *this* reasoning of the Ninth Circuit erroneous") (B. A. 23). The Court below further observed "The Board, although relying on the decision of the Ninth Circuit in *Leonard,* goes somewhat further in its reasoning" (B. A. 25).

The Union in the Court below in its brief and oral argument made the very point that while the Board said it was merely applying the rule of the *Davis* case, that the Board was going beyond the Davis case. In the *Davis* case, the Ninth Circuit noted specifically that the anticipated strike (which was announced) "threatened the loss of customers and a cessation of the Dealer's Market" and it was this fact that led the Ninth Circuit to distinguish it from the case of *N. L. R. B. v. Sommerset Classics,* 193 F. 2d 613 (C. A. 2). In the instant case there is not a shred of evidence to support the conclusion that the implied threat of strike threatened a loss of customers and a cessation of the Linen market.

The trial examiner accurately distinguished the cases as follows:

"Certainly, it can be said that under the rationale of the Board's decisions in the Morand and Davis cases, (the non-struck employers) conduct was unquestionably unlawful, since it constituted a reprisal against the employees because the Union, as their bargaining representative, had engaged in a lawful strike against Frontier. Thus, in the absence of evidence that strikes against other members were threatened or anticipated, that (the non-struck employers) were unable to operate without assurances

against being struck, that (they) had sought and failed to obtain such assurances, or, alternatively, assurances of adequate notice for the arrangement of their operations, it cannot be found that the lockout was defensive in nature. Stated differently, there was no showing that there were any economic considerations which justified the lockout, and none that the motive was in fact the protection of their economic interests." *C. F. Betts-Cadillac-Olds, Inc.*, 96 N. L. R. B. 268; *International Shoe Company*, 93 N. L. R. B. 159; *Duluth Bottling Association*, 48 N. L. R. B. 35 (J. A. 27-28; R. 34).

The petitioner thus overlooks a well established principle that "a judicial opinion, like a judgment, must be read as applicable only to the facts involved and is an authority for only what is actually decided", *People v. Chapman*, 370 Ill. 430, 455, and that "questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents". *Webster v. Fall*, 266 U. S. 507, 511. See also *KVOS v. Associated Press*, 299 U. S. 269, 279; *U. S. v. Tucker*, 344 U. S. 33, 38.

The Union's counsel in response to questions put by the Court below stated very candidly his position that the decision of the Ninth Circuit in *Davis Furniture*, 197 F. 2d 435, 205 F. 2d 335 was erroneous. One can believe that the Court below is of a similar disposition. The point is that the instant case is factually different from the *Davis* case.

There is no conflict with the decision in the Seventh and Eighth Circuits. The decision by those Courts (B. A. pg. 22, n. 5) had different facts and the observations regarding the right of employers to lockout its employees as a corollary of the employees' right to strike were *dicta*.

The petitioner would create the conflict by the assumption that the Court below adopted "the motivation test" when the Court below found an absence of economic justification, without regard to motivation for this clear violation of the plain language of 8(a)(3) and (1) of the Act.

The petition further argues that if employers are disabled from using the sympathetic or secondary lockout that multi-employer bargaining will come to end. This argument assumes that multi-employer bargaining is good for the national welfare. There is nothing in the Act which would support such a premise and in the legislative history one can garner as many arguments against multi-employer bargaining as for it (B. A. pgs. 31-32, f. n. 13).

More fundamentally the Board now is willing to adopt the unproven assertion that the individual employers would be unable to stand above in bargaining with Local 449. But even assuming, *arguendo,* that employers required a united front, the Congressional inquiry by the joint committee set up under Section 402 of the Act might well be exploring the feasibility of an agreement among the employer's group, to save the struck employer harmless from financial losses incurred by the strike; supply service for the struck employer; the creation of a fund to meet this contingency; and agreements not to retain old customers acquired during the strike. No doubt there are other workable solutions to the problem.

Whatever can be gathered from the legislative history of the Act in support of a policy of multi-employer bargaining, there is not a shred of evidence that Congress ever considered the desirability of effectuating such policy by the grant of the right to lockout under the facts in this record.

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR TRUCK DRIVERS LOCAL UNION NO. 449

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.,
Respondent.

BRIEF FOR TRUCK DRIVERS LOCAL UNION NO. 449

Opinions Below

The opinion of the Court below (R. 42-55) is reported at 231 F. 2d 110. The findings of fact, conclusions of law, and order of the Board (R. 34-37) are reported at 109 NLRB 447.

Jurisdiction

The decree of the Court below (R. 61) was entered on March 13, 1956. The petition for a writ of certiorari was filed on May 23, 1956, and granted on October 8, 1956 (R. 62) 352 U. S. 818. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*) appear in Appendix A, *infra.*

The Question Presented

Where a corporation lays off its truck driver employees solely because the fellow union members of its employees are on strike at another corporation, is the non-struck corporation excused for its violation of Section 8(a)(1) and (3) of the National Labor Relations Act solely because it has bargained jointly in the past with the struck corporation?

Statement

A. Findings of Fact

This case was tried on an agreed state of facts established either by admissions in the answer to the complaint of the General Counsel or by stipulation (R. 16-20).

Linen and Credit Exchange is an unincorporated association composed of eight corporations located in the cities of Buffalo, Niagara Falls and Dunkirk, New York, which are engaged in furnishing, supplying, and servicing industrial and commercial enterprises with cotton and

linen towels, uniforms and related items.[1] The Exchange and seven of the corporations were named as respondents in the action before the Board. The eight corporations have been members of the Exchange for some 13 years during which time each of the members of the Exchange recognized Local 449 as the exclusive bargaining representative of their respective employees, employed as truck drivers (R. 17-18).

Negotiations of the terms of the collective bargaining agreements were worked out by representatives of the Exchange and Local 449 and then submitted to the membership of the Exchange and Local 449 for majority approval. When majority approval was given, the agreement was signed by each member of the Exchange and by the Secretary-Treasurer and Business Agent for Local 449 (R. 17, 35).

In accordance with the then agreement Local 449, 60 days prior to the expiration date, gave notice of a desire to change the agreement. Negotiations for a new agreement began some time in March 1953 between the Exchange, acting on behalf of its members, and Local 449, acting on behalf of its member truck drivers. The negotiations continued off and on until May the 26th of 1953 at which time the truck drivers for Frontier Linen Supply Co., a member of the Exchange, went on strike, and established a picket line that day at Frontier. That same night, May the 26th, the Exchange and Local 449 had a meeting and during that meeting and at one or two subsequent meetings the non-struck employers told the representatives of Local 449 that their employees were laid

[1] The City of Buffalo is located in Erie County, Niagara Falls in Niagara County and Dunkirk in Chautauqua County of the State of New York.

off because of the strike at Frontier, and that if Local 449 would withdraw its picket line and cease the strike at Frontier, they would permit their employees to return to work (R. 18, 26). On May the 27th, the seven non-struck members of the Exchange locked out their employees.

It was stipulated that:

> "The employees referred to in Paragraph VIII of the Complaint were laid off for the reason that their bargaining representative, Local 449, had engaged in a strike on May 26th 1953, at the Frontier Linen Supply, Inc., Buffalo, New York, also a member of the Linen and Credit Exchange, the bargaining representative for all of its employer members" (R. 16).

B. The Trial Examiner's Findings and Report

The trial examiner, based on the facts, concluded that the non-struck employers had engaged in unfair labor practices proscribed by Section 8(a)(1) and (3) of the Act. He found:

> "Respondent's (the non-struck employers) conduct was unquestionably unlawful, since it constituted reprisal against the employees because the union, as their bargaining representative, had engaged in a lawful strike against Frontier[2] * * *[t]here was no showing that there were economic considerations which justified the lockout, and none that the Respondent's motive was in fact the protection of their economic interests. Cf. *Betts-Cadillac-Olds, Inc.*, 96 NLRB 269; *International Shoe Company*, 93 NLRB 159; *Duluth Bottling Association* 48 NLRB 1335".

C. Board's Conclusion and Order

The Board, upon the facts decided, with member Murdock dissenting, "in the circumstances we think the more reasonable inference is that, although not specifically an-

[2] The finding as to the lawfulness of the strike at Frontier was adopted by both the Board and Court of Appeals.

nounced by the Union, the strike against the one employer necessarily carried with it an implicit threat of future strike against any or all of the other members of the Association for the Union's action represents a familiar technique of exerting pressure to atomize the employer solidarity which is the fundamental aim of the multi-employer relationship * * *. Therefore, and in the absence of any independent, we find that the action in shutting their plants until termination of the strike at Frontier was defensive and privileged in nature, rather than retaliatory and unlawful" (R. 36).

The majority of the Board said that it was not establishing the premise "that the employer lockout is the corollary of the employee's statutory right to strike", acknowledging, however, that the Ninth Circuit Court of Appeals had stated that such was the law in *Leonard, et al. d/b/a Davis Furniture Co. et al. v. NLRB*, 205 F 2d 355 (C. A. 9); (R. 36).

The majority of the Board then went on to state that it was merely affirming the legal concept enunciated in *Davis Furniture:*

> "* * * a strike by employees against one employer-member of a multi-employer bargaining unit constitutes a threat of strike action against the other employers, which threat, *per se* constitutes the type of economic or operative problem at the plants of the non-struck employers which legally justifies their resort to a temporary lockout of employees" (R. 37).

At the same time the majority noted that in Davis Furniture it was stated, "* * * the whipsawing threatened the loss of customers and a cessation of the (employer's) market" (R. 37).

D. The Decision Below

The Court below sustained the findings of fact and agreed that under the circumstances and from the strike at Frontier the Board "reasonably inferred * * * a threat" of strike against the non-struck employer's (R. 44).

The Court then came to the heart of the case, "i.e., whether the threat of a strike legalized the lockouts by those employers against whom no strike had been called" (R. 44).

The Court proceeded to note that Section 7 of the Act guarantees employees the right to engage in "concerted activities" for "their mutual aid or protection", and that the right to strike and to support a strike constitutes "concerted activity" protected by statute (citing cases). It then observed that: "Interference with this right by the employer constitutes an unfair labor practice under 8(a)(1) of the Act, and a lockout prompted by a purpose to defeat employee organization or otherwise protected concerted activities is violative of the Act (citing cases). Such a lockout would also violate Section 8(a)(3) of the Act (citing cases) (R. 44-45).

Continuing the inquiry by steps to the heart of the case, the Court noted that "the Board, in its brief, concedes[2] as it must the basic principle that an employer

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[2] In view of the contradictory statement contained at page 15 in the Board's petition for *certiorari* fairness compels us to cite from page 8 of the Board's brief in the Second Circuit in this case—viz—.

"On the other hand, it is equally clear that a lockout prompted, not by such business considerations, but by a purpose to defeat employee organization or other protected concerted activities, is violative of the act (citing cases)".

And the Board further stated at page 9 of that same brief:

"* * * the Board has held (referring to cases cited in union's brief that the ordinary economic hardship occasioned by a strike does not privilege an employee to counter a strike threat with an anticipatory lockout".

Whether the Board contemplated the foregoing as a concession or not, the principle obtains with or without concession. See e.g. *American Brake Shoe*, 116 NLRB 107.

who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (R. 45).

Noting those cases (without approval or disapproval) where the Board had found justification for the anticipatory lockout, it then addressed itself to the fundamental question (R. 45-46) i.e., whether the mere threat of strike (deemed created) was justified merely because the struck and non-struck employers had theretofore, bargained as a group?

The Court answered the question in the negative (R. 47). The Court of Appeals for the Second Circuit correctly observed that the threat of strike deemed created by the Board placed the non-struck employers in no different position than the single employer threatened with a strike (R. 47). The Court distinguished the *Davis* case where the Ninth Circuit adopted the presumption that the non-struck employers were too weak economically to stand alone, from the instant case—"For there is no proof here, and no finding, that any of the employers who locked out was thus economically weak. On the contrary, according to the stipulated facts, the sole reason for the lockouts was the strike against a single member of the association and a desire to end that strike" (R. 47). The Court concluded by holding (R. 52):

> "The arguments against legalizing lockouts, merely because a multi-employer unit is involved were set out by the Board itself in the *Morand* case, 91 NLRB 409, 412-415 * * *"

The Court below further reasoned:

> "Multi-employer bargaining has never received the express sanction of Congress. It would stretch the usual canons of interpretation unduly far to conclude that, in enacting the Taft-Hartley Act, Congress gave

legislative approval to all previous Board rulings concerning such bargaining. Even if we assume that it did, still the Board, at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the 'stability of the employer unit'. We think Congress must have intended that such a radical innovation be left open for consideration by the joint committee it set up under Section 402 of the Act to study among other things, 'the methods and procedures for best carrying out the collective bargaining process, with special attention to the effect of industry wide or regional bargaining upon the national economy' " (R. 53-55).

Summary of Argument

In most summary form, our argument is that the non-struck employers by admissions in their answer and by stipulation establish a transgression of the plain meaning of the language of Section 8 (a)(1) and (3) of the Act and that there is no basis in fact or in law for immunizing such conduct.

Once it appears, as it does here, that an employer has penalized employees, and thus discriminated against them, because the employees exercised a statutory right, a *prima facie* violation of the Act has been made out.

Under well understood principles of law, the employer must come forward with an explanation for this violation if it is to avoid the sanctions of the law.

A question of law would then arise as to whether the explanation, assuming it to be worthy of credence, is sufficient reason to justify the violation of the Act.

In the instant case no question is or has been raised that the strike at Frontier Linen is concerted activity protected by Sections 7 and 13 of the Act.

In the instant case no question is or has been raised that even if the employees at the non-struck employers supported such strike, that this support is concerted activity protected by Sections 7 and 13 of the Act.

In the instant case no question is or can be raised that the employees of the non-struck employers were laid off because of the exercise of their rights guaranteed by Section 7 and 13. It was expressly stipulated:

> "the employees (of the non-struck employers) were laid off for the reason that their bargaining representative, Local 449, had engaged in a strike on May 26, 1953, at the Frontier Linen Supply Co., Inc., Buffalo, New York, also a member of the Linen and Credit Exchange, the bargaining representative for all of its employer members (R. 16-17)."

Clearly then, *per se* violations of the provisions of Section 8 (a)(1) and (3) of the Act were made out. The Trial Examiner, Member Murdock, and the Court below held, that the non-struck members of the Exchange, at the very least, should have come forward with some explanation which they conceived to be justification for the violations of the Act. The record is barren of explanation.

The majority of the Board held that the non-struck employers were privileged to lay off their employees to preserve *the solidarity of the multi-employer group.*

The Board decided that "the threat of strike[4] action * * * *per se*, constitutes the type of economic or operative

[4] The Board's inference that the strike at Frontier carried with it the threat to strike the non-struck corporations overlooks some facts of life. It assumes that the Union has the desire, resources and more importantly the authorization of the truck driver employees at a given employer to carry out such strategy. Furthermore, there is no finding that such strikes were imminent and the non-struck employers didn't even bother to inquire (R. 26). cf. American Brake Shoe, 116 NLRB No. 107. In any event we fail to see how the non-struck employers were in any different position after the strike at Frontier, than before.

problem at the plants of the non-struck employers which legally justifies their resort to a temporary lockout of employees (R. 37).

There is no statutory authority for the proposition that, the threat of strike *per se* activates an employer's right to lay off his employees. If such should be made the law, the only economic weapon of the employees, the right to strike, is rendered useless before it is applied.

There is no basis in the record of this case to support the conclusion that the strike at Frontier created an economic or operative problem at the plants of the non-struck employers. The non-struck employers never made any such claim. Indeed, the only problem reasonably to be anticipated would be an increased volume of business by reason of the strike at its competitor, Frontier.

The Board, however, by acquiescing to this reasoning of the Ninth Circuit, did not say an economic or operative problem was *created* by the implied threat of strike, but held that the implied threat of strike *constituted* an economic or operative problem sufficient in itself to justify a violation of the plain words of the statute.

We maintained and the Second Circuit Court of Appeals agreed, that the Board by adopting this presumption exceeded its legislative mandate by making new law to be applicable to multi-employer groups whether certified or not.

The Board's decision would have given to employers the right to lockout upon an implied threat of strike and add to the arsenal of multi-employers groups, the potent weapon of secondary lockout. We think the Board was correct when it held in the *Morand* case, 91 NLRB 409, at 412:

"To hold that employees in a multi-employer unit who remain at work may be treated as strikers, solely because of a strike by other employees, would involve the introduction of a new concept in labor relations—i.e., the vicarious or constructive strike. We know of no legislative or other warrant for introducing such a concept".

We think the Board was likewise correct when it held in *Morand ibid* at 416, that the:

"Failure to pass proposed legislation banning industry-wide or regional bargaining does not in our opinion reflect a congressional intent to foster and promote such bargaining in preference to individual employer bargaining, but only an intent to leave undisturbed the *status quo* which made such a practice permissible."

The Board in the instant case by succumbing to the reasoning of the Ninth Circuit in *Davis Furniture* not only would have destroyed the right to strike with a consequent increase in the disproportion in bargaining position of employees and the employers doing business in the corporate form, but would increase the area of economic conflict with consequent deprivation of services and commodities to the public. The Act was purportedly designed to prevent or minimize all of these consequences.

The Court below having found no reason to distinguish this case from that of the individual employer faced with the threat of strike (R. 47) held that in the absence of economic justification and none appears here (R. 55) that the Board by legalizing the lockout merely because a multi-employer was involved exceeded its legislative mandate (R. 55).

"We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly

protected, merely to effectuate a policy as to which Congress, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the Act, and a usurpation of the power of Congress" (R. 55).

We submit that the decision rendered below, by the United States Court of Appeals for the Second Circuit is correct.

ARGUMENT

POINTS

I

The right to strike and to support a strike are concerted activities protected by Section 7 of the Act and a lay off of employees because of their participation in such activities is in violation of Section 8 (a)(1) and (3) of the Act.

Section 7 of the Act guarantees employees the right to engage in self-organization, collective bargaining and "other concerted activities" for their "mutual aid or protection".

The right to engage in concerted activity for mutual aid or protection embraces "the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands" (N. L. R. B. vs. Fansteel Metallurgical Corp., 300 U. S. 240, 256).

This Court has twice recently reaffirmed this rule. "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *U. A. W. v. O'Brien*, 339 U. S. 454, 456-457; *Amalgamated Association v. WERB*, 340 U. S. 383.

Section 8 (a) (1) of the Act bars infringement by an employer on concerted activity and Section 8 (a) (3) of the Act bars discouragement of membership in a labor organization by discriminatory alteration of employment for union activity. Any alteration of employment status is discriminatory where it is in "punishment for, or discouragement of, such activity, as the Act declares permissible." Employees are safeguarded in their exercise of the right to strike by those sections of the Act which prohibit an employer from impairing the tenure or terms of employment in retaliation for their actual or anticipated recourse to strike action.[5]

It is well established law "that strike activity actual or threatened is concerted activity, and concerted activity does not cease to be protected merely because it is or may be effective, or because it subjects the employer to economic hardship". *N.L.R.B. v. National Broadcasting Co., Inc.*, 150 F. 2d 895, 900 (C. A. 2). It has been consistently held that neither a strike nor the threat of strike (*National Liquors Co. v. N.L.R.B.*, 309 U.S. 350); nor fear of economic pressure (*N.L.R.B. v. Fred P. Weisman Co.*, 170 F. 2d 953 (C. A. 6); *American Car and Foundry Co.*, 161 F. 2d 953 (C. A. 6); nor economic hardship (*Lakeshore Electric Mfg. Co.*, 67 N.L.R.B. 804) justifies discriminatory action against employees. The employees exercise of concerted "activities may be highly prejudicial to (the)

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[5] *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345, 347-348 (refusal to reinstate leaders of an economic strike); *N.L.R.B. v. Remington Rand, Inc.*, 130 F. 2d 919, 928 (C. A. 2) ("Respondent, by its immediate discharge of the strikers and attempted abnegation of the employment relationship was guilty of an unfair labor practice"); *Firth Carpet Co., v. N.L.R.B.*, 129 F. 2d 633, 635 (C. A. 2) (refusal to reinstate employees because they engaged in a strike); *N.L.R.B. v. Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 663 (C. A. 2) (discharge of employees for striking). *N.L.R.B. v. Wallick & Schwaler Co.*, 198 F. 2d 477 (C. A. 3); *N.L.R.B. v. Somerset Classics*, 693 F. 2d 613 (C. A. 2) cert. den., 344 U. S. 816; *Olin Industries v. N.L.R.B.*, 191 F. 2d 613 (C. A. 5), cert. den., 343 U. S. 919.

employer; * * *but the statute forbids him by discharge to rid himself of those who lay burdens upon him. Congress has weighed the conflict of his interest with theirs, and has *pro tanto* shorn him of his powers". Chief Judge Learned Hand, in *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*, (30 F. 2d 503, 506 (C. A. 2)).

The Board offered this principle when it held in *Marand Bros. Beverage Co.*, 99 NLRB 1448 (on remand) at 1462-1463:

> "Neither Section 8 (a) (1) nor Section 8 (a) (3) of the Act draws any distinction between a discharge and a temporary layoff. The broad language utilized proscribes both permanent and temporary terminations of the employment relationship when directed against protected concerted activity. We are not free to cut down on the broad proscriptions of Section 8 (a) (1) and 8 (a) (3), so as to sanction lockouts, which are designed to break a bargaining, impasse by bringing economic pressure on employees who have engaged in collective bargaining, unless other sections of the statute clearly require it. We find no such requirement".

It being established that the support of the strike at Frontier Linen by the employees of the non-struck employers was "concerted activity" for their "mutual aid or protection"[8] and it being admitted by express stipulation that these employees were laid off by reason of their implied support of the strike at Frontier and were to remain laid off so long as the strike and picket line continued, it follows that this record contains clear and in-

[8] No charge was made that the employee's activity was anything other than protected concerted activity. The trial Examiner so found (R. 28) and this finding was not disturbed by either the Board or the Second Circuit. This issue seems to have been settled by the decision in the *Morand* case, 91 N.L.R.B. 409; 190 F. 2d 576 (C. A. 7). This point was not raised in *Davis Furniture Co.*, 94 N.L.R.B. 279; 197 F. 2d 435 (C. A. 9); 100 N.L.R.B. 1016 (on remand) 207 F. 2d 355 (C. A. 9).

deed, classic illustrations of violations of the plan language of Section 8 (a) (1) and (3) of the Act.

The Board chooses to ignore the plain language of the statute and to talk in terms of protecting "the solidarity" of an unincorporated association composed of fictional entities known as corporations. The Board postulates, by stating metaphorically, the answer to the question raised by the facts of litigation.

It may be urged that by hiring replacements during a strike an employer diminishes the effectiveness of a strike and that a layoff of employees who belong to the striking union falls into the same category.

Though the result may be the same, there is a critical difference between the means.

The employers right to hire replacements is part of its right to operate a plant, and it may be said to square with the Acts' purpose to eliminate or minimize obstructions to commerce. The continuation of operations is the employer's counterpoise to the striker's attempt to curtail production.

There is a fundamental difference in character between the continuation of production and curtailment, and it is the particular character of the curtailment under the facts in this record which is the issue before this Court.

II

There is no evidence in the record or reason in law to support the conclusion the layoff was justified.

The non-struck members of the Exchange offered no factual defense for the lockout but rested on some unexpressed premise which they derived from the language used

by the Seventh Circuit in the *Morand* case[7] and the Ninth Circuit in the *Davis* case[8].

The non-struck members never claimed or attempted to support the claim that they could not operate under the threat of strike. Their position was no different after the strike at Frontier then before. There was always the implied threat of strike. Indeed, their fears were somewhat allayed since they could assume that if there was to be any strike at their plant it would not occur until after the conclusion of the strike at Frontier. As a matter of fact, they didn't bother to ask and made no claim that they couldn't operate. The Trial Examiner stated it very succinctly (R. 26):

> "• • • there was no showing that there were any economic considerations which justified the lockout, and none that the (non-struck employer's) motive was in fact the protection of their economic interests".

Board Member Murdock in his dissenting opinion herein restated the cases wherein the phrase "economic or operative problem" was applied and from which the principle of "justification" stems (R. 37 at 39).

> "It is true that the Board and Courts have held that certain lockouts are permissible where the record is clear that it is not economically feasible for the Respondent to keep its doors open under the threat of an immediate strike. Thus, in Betts-Cadillac Olds, Inc., 96 NLRB 268, a group of automobile dealers were fearful that if they accepted automobile repair jobs they could not, under threat of strike, assure their customers that the work would be done expeditiously.
>
> The Board affirmed the Trial Examiner's finding that the lockout, in anticipation of the strike was justified. Similarly, a lockout to prevent spoilage of materials, (Duluth Bottling Association, 48 N.L.R.B. 1335) or

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[7] *Morand Bros. Beverage Co.*, 190 F. 2d 576; 204 F. 2d 529.
[8] *Leonard, et al d/b/a Davis Furniture Co.*, 197 F. 2d 435; 205 F. 2d 355.

one induced by the operative difficulties of running a plant where the union struck one of three integrated departments (International Shoe Company, 93 N.L.R.B. 907) has been held lawful".

The decision in this case does not necessitate a holding that the resumé of Member Murdock is all inclusive or even correct,[9] nor do we see any necessity for setting the precise limits of the forbearance which the Act requires of an employer faced with an implied or actual threat of strike. All that is necessary to decision is that there is no explanation which can be extracted from the record in this case to justify the plain transgressions of the prohibitions contained in Section 8(a)(1) and (3).

Stripped of such verbal abstractions as "solidarity", "unity", "motive", "economic or operative problems" which obscure or evade the real issue, the Board's argument rests on the presumption, wholly without claim or support in the record, that the employers were economically weak.

The Board's argument posits all multi-employer groups are formed because the individual corporations are economically weaker than a union composed of their respective employees:

The Linen and Credit Exchange is a multi-employer group.

Therefore, the individual corporate members are weaker than the union.

The Board chooses to overlook the facts of this record.

The Board itself refused prior to this case to establish as a principle that economic weakness creates legal im-

[9] Nor do we concede the correctness of the principle of such cases.

munity (*Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 at 412).

> "The Board has held, with judicial approval, that an employer's economic interest in preventing a strike does not justify him in engaging in conduct of the type proscribed by the Act[10]."
>
> The fact that the expected strike may be so timed or so directed as to place severe economic pressure on the employer does not, in our judgment, remove the strikers from the protection of the Act. Strike activity, actual or threatened is concerted activity and concerted does not cease to be protected merely because it is, or may be effective, or because it subjects the employer to economic hardship[11]."
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> • • •
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> "In this case (Morand), the effect of granting immunity to the discriminatory lockout by 34 employers, in reprisal against the strike against a 35th employer, would be to multiply the obstruction to commerce. It would set a sweeping precedent for the conversion of any single employer's dispute into an association—wide or industry wide dispute. An isolated skirmish would become a civil war".
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> • • •
>
> "The logical corollary of the (non-struck employer's) position is, therefore, that a union seeking to negotiate a contract with a group of employers, however large, must strike all or none. If it strikes less than all, its members will be deprived of the protection of the Act; if it strikes all, they will be protected. We cannot give such an incongrous construction to an Act designed to minimize industrial strife".

If the weakness of the employer is to be the parameter of the limitations to be imposed on employees by reason of

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[10] *N.L.R.B. v. Star Publishing Co.*, 97 F. 2d 465, 470 (discriminatory transfers); *Goodyear Tire & Rubber Co. of Alabama*, 21 N.L.R.B. 306, 371 (discriminatory discharges); *Ward Baking Co.*, 8 N.L.R.B. 558, 567; *Humble Oil & Refining Co.*, 16 N.L.R.B. 112, 113-120. cf. *Lengel-Fencil Co.*, 8 NLRB 988 which is distinguishable on the facts.

[11] *N.L.R.B. v. National Broadcasting Co., Inc.*, 150 F. 2d 895, 900 (C. A. 2, 1945) and cases there cited.

their exercise of statutory rights, then fairness demands that an inquiry be had into the relative economic strength of the combatants and the non-combatants.

The legislative assumption has been to the contrary. The Congress adopted the economically self-evident presumption that it was the employees who were weak and by successive legislation, culminating in the enactment of the Wagner Act accomplished an economic balance. The Labor Management Relations Act of 1947 corrected what it considered to be some excesses on the part of the employees.

Congress, in the amendments to the Act in 1947 retained the original declaration of its purpose to eliminate the inequality of bargaining power arising from the superior economic strength of employers. Congress added an additional purpose—the elimination of "certain practices by some labor organizations". The overall purpose was the minimization of industrial strife.

The technique adopted to accomplish these purposes was to amend the Act, and in Section 8 (b) thereof, certain practices of labor organizations were proscribed and certain obligations were added. Conduct of employers which theretofore had been deemed inimacable to peaceful settlements of disputes was continued under the ban of Section 8(a). Section 8(a)(1) and (3) were continued in force. In addition, the right of free speech was expressly guaranteed to employers.

Thus, we can observe in summary, that Congress has imposed sanctions on the means employed in a strike (*N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 256) and the purpose of a strike (*American News Co., Inc.*, 55 N.L.R.B. 1302); it has in the interest of the public wel-

fare, established certain conditions which must be fulfilled before any strike over contract modification or termination may be had (Sec. 8(d) of the Act) and has outlawed strikes where the method or the objective was deemed contrary to the public interest (Sec. 8(b) (4) of the Act). Aside from these sanctions and limitations the right to strike was expressly preserved and Congress protected such right against other means or sources of limitation by Section 13 of the Act.

The Board then, in excess of their mandate, extended the technique based on a tacit presumption of the relative weakness of *employers* merely because of the form of the bargaining group, to defeat the express purpose of the Act. There is nothing in the Act or its legislative history to support this anomoly. The Board in fostering the sympathetic lockout ignores the plain language of Sections 7 and 13 and Section 8(a)(1) and (3) of the Act.

III

Lockouts are not the employer's equivalent of the employee's right to strike.

The Board noted in its brief (Petitioner's Brief page 12; Footnote 7) that it reserved decision on the question of whether lockouts are the employer's equivalent of the union's right to strike.

The Board further notes its decision in *American Brake Shoe Co.*, 116 N.L.R.B., No. 107 (August 28, 1956), 38 LRRM 1330, where the Board held at 1335:

> "The Act guarantees to employees the right to engage in strike to secure, among other things, better wages, hours, and working conditions. Strike action is thus a legitimate means of employees to exert economic

pressure upon their employer. Its effectiveness as such a weapon depends largely, if not entirely upon the extent to which a strike disrupts the employer's normal business and business relationships. We believe that Congress, in guaranteeing to employees the right to strike, did not intend to grant them a hollow right by at the same time, allowing an employer to avoid the normal consequences of a strike by anticipatory action which discriminates against employees because of their union activities or otherwise interferes with their rights under the Act. *If such anticipatory conduct were sanctioned the employer would be immunized from effective strike action, and the employees right to strike would be rendered virtually meaningless".* (Emphasis supplied.)

In addition to the foregoing the Board in its decisions in the *Morand* case, 91 N.L.R.B. 409, and particularly in that case on remand 99 N.L.R.B. 1448 at 1461-1466, and in the *Davis* case on remand 100 N.L.R.B. 1016 at 1018-1021, fully explicated its views and the reasons for rejecting any such facile equation of economic remedies.

We may be accused, then, of assailing a conceded fortress by now raising this point for argument. We submit our argument only because it seems to be the main theme of the briefs *amici* accompanied with overtones of the Board's "were too weak".

The argument[12] stemming from the linking of "strikes and lockouts" has the merit at least of relying (erroneously the parties agree) on the words of the statute, whereas the "we're too weak" argument is without claim or support in the record and in the face of the uncontradicted finding by the Trial Examiner—(R. 26).

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[12] The further argument that the Union continued to bargain with the Exchange is somewhat misleading in that the Board is well aware that whatever form the bargaining took, the struck and the non-struck corporations could designate their bargaining representative free from any demands in that respect, from Union or its agents 8(b)(1)(B). The Board itself fully discussed a parallel situation in the *Morand case*, 91 NLRB 409.

The Court below rejected the reasoning of the Ninth Circuit that the linking of the term "strike and lockout" supports the conclusion that Congress recognizes the two as correlative economic powers (R. 47). The Second Circuit held (ibid):

> "But we think the Board, in *Davis Furniture Company*, 100 NLRB 1015, 1019 correctly noted that, in each instance where those two words are linked, a particular strike activity is proscribed as unlawful, and the specific inclusion of a 'lockout' in this context may well have stemmed 'from a desire to emphasize even-handed justice where union activity was being restricted * * *'. We find nothing in the Act which equates lawful strikes and lockouts. On the contrary, only the right to strike is expressly reserved by Congress in Section 13 of the Act * * *".

The statement made by Senator Taft[13] which the Ninth Circuit in the *Davis* case considered significant 205 F. 2d 335, it must be noted, was made in the context of dispensing "even handed" justice under the Ball amendment which made it an unfair labor practice for a labor organization to interfere with employee rights guaranteed under Section 7 of the Act. Mr. Taft stated that "the amendment is founded on what I consider to be the basic theory of the entire bill, that is, an attempt to create equality between the employer and employee". It is obvious from the colloquy between Senator Taft and Senator Morse that neither one of them took the argument too seriously[14].

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[13] "Men have come to me and said, regarding the question of an injunction for 60 days against a nation-wide strike 'you enjoin the strike, but you do not do anything to the employers'. The opposite is the fact. Anyone who read the section will see that there is a right to enjoin a *lockout* just as well as there is a right to enjoin a strike. * * *" 2 Legislative History of the Labor Management Relations Act 1206.

[14] In an article entitled "The Legislative Process in Canada", reported at Volume 41 of the American Bar Association Journal 169, Mr. Elmer D. Driedger, Parliamentary Counsel, Department of Justice, Canada, made an interesting comment on the use of legislative history at page 171:

(Footnote continued on following page.)

For as Senator Morse remarked:

> "I simply want to say that I think it would be a very interesting case if a Court undertook to compel an employer who says 'I cannot pay the wages' to continue to operate his plant, even though he does not have the money with which to pay the wages. I think there would be some very interesting questions raised with regard to due process of law under such an injunction". 2 Leg. Hist. 1206.

The Board in its decision in the *Morand* case, 99 N.L.R.B. 1448 (on remand) gave a full and convincing analysis of the legislative intent in linking "strikes and lockouts".

After noting that in each case where the words "strike or lockouts" were linked it was when the activity was proscribed the Board held "there would seem to be no more reason for holding that that phrase immunizes all lockouts or particular types of lockouts, then there is for holding that it immunizes all strikes, or particular types of strikes. Moreover, the mere fact that there is an express proscription of one type anti-union conduct—i.e. lockouts in one section of the Act—is not a persuasive reason for finding that such conduct is exempt from the blanket pro-

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(Footnote continued from preceding page.)

"A member can discuss the bill only on his interpretation of it, which may or may not be correct. The members of the Cabinet, on the other hand, are concerned with the immediate problem at hand, namely getting the bill through the House and securing its popular acceptance, than with setting future legal interpretations of the statute on facts that have not yet arisen, and the private member, either in the House or in committee assails the measure for what it says, and not the Ministry says about it. And when Parliament adopts the measure, the written words therein become the law, and not the conversations that took place beforehand or the political bricks or bouquets that were showered on the Bill when it ran the parliamentary gauntlet".

It is not our purpose to discourage recourse to the legislative history but we cannot extract from Senator Taft's remarks on lockouts any other meaning than that he was there attempting to show that the Ball amendment was equitable. Indeed, as we read the colloquy, it was not intended to be a persuasive commentary on even the emergency dispute section. See also, in 2 Legislative History of the Labor Management Relations Act of 1947 at page 1594, the colloquy between Senators Taft and Pepper for an interesting explanation of the legislative process.

scriptions of Section 8 (a) (1) and (3) of the Act. There are many instances of conduct which violates more than one provision of the Act". 99 NLRB 1448 at 1463.

The Board then explained the clear intent of the Congress:

> "It seems clear to us from a reading of Section 8(d)(4) that the sole concern of Congress in enacting that provision and the entire thrust, thereof was to discourage resort of self-help by *both* employees and unions during that period. It is understandable that, in seeking to underscore this purpose, Congress would specifically proscribe the most relevant forms of self-help namely, strikes and lockouts. It follows from this view that Congress was not concerned at this point with the legal status of strikes and lockouts under other provisions of the Act but was solely desirous of insuring that, *whatever that status might be,* no strikes or lockouts would occur during the sixty day period".

By banning "strikes or lockouts" during the 60 day period, Congress avoided the task of deciding whether the stoppage was one or the other. Mr. K. G. J. C. Knowles in his book "A Study in Industrial Conflict" (Philoso- in his book "A Study in Industrial Conflict" (Philosophical Library, New York 1952) at page 299 explained this

> "*Difficulty of distinguishing strikes from lockouts.* At first sight it would seem useful to have a breakdown of disputes into strikes and lockouts. In practice, however, as was found by the United Kingdom Alliance of Organized Trades as far back as 1866 (this organization was formed to support men locked out by their employers, but could never decide what constituted a lockout) no precise distinction can be made;

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(13) See also "Organized Labor" by Mills and Montgomery (1945) at 691 footnote 23; "Trade Union Wage Policy" by A. M. Ross (Berkeley, U. of California Press, 1948) at 106-107 "To levy blame for a stoppage requires a more sophisticate analysis than one which merely identifies the party making the first move". Labor Economics & Labor Relations 2 ed. (Prentice Hall) (1954) at 329; Collective Bargaining by Chamberlain (McGraw Hill 1951) at 228. This was Senator Morse's point. See 2 Leg. Hist. of the Act at page 958.

for the distinction is as difficult and subjective as that between aggressive and defensive war. * * * But since strikes may be provoked by employers and lockouts by workers, 'the question from which side the declaration is finally made is rather immaterial. Sometimes, indeed, it is impossible to say even whether a dispute should be formally called a strike or a lockout', (Florence Peterson, Strikes in the United States 1880—1936 in (U. S. Bureau of Labor Statistics Bulletin No. 651 at pages 3-4 gives a number of examples to illustrate this difficulty)) some disputes are both, successively or simultaneously.

The distinction between strike and lockout, then, can provide no indication of where the 'war guilt' lies, and is of value only as showing what *forms* disputes appear to take at different times".

But the arguments in the briefs of the *amici* overlook or disguise the fact that the *sympathetic* lockout is the corollary not of a strike, but of a secondary boycott[16]. For in the sympathetic lockout, pressure is brought to bear upon third persons—their own non striking workers who are not immediately involved in the dispute—for the purpose of preventing them from lending their moral and economic support to the striking workers. Such an equation of weapons can hardly be squared with the avowed Congressional purpose to minimize and localize obstructions to commerce.

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[16] See Vol. 10 of Studies in History and Economics and Public Law—Columbus University (1898) entitled "Sympathetic Strikes and Sympathetic Lockouts". The Study shows, at page 51: "The sympathetic lockout proves thus to be as generally used as the sympathetic strike. It developed much earlier than the sympathetic strike, because the necessity which called it into existence was itself an early development and because the higher intellectual position of employers made them more willing to discount a present injury in order to gain a future good. They could understand it fifty years ago the employers could not". The author then demonstrates how and why the Unions developed the "general Strike" weapon in England. It is of some interest to note that the first sympathetic lockout occurred in London in 1851.

IV

There is no congressional policy favoring multi-employer bargaining over single-employer bargaining.

It has been seen and, indeed, agreed upon (American Brake Shoe, 116 NLRB No. 107 (August 28, 1956), 38 LRRM 1330) that in the case of the single employer the mere threat of strike does not by itself constitute the type of economic or operative problem as will justify the resort to the lockout.

Indeed, it will be agreed that a single employer operating many plants could not shut them all down merely because of a strike at one.

The Board, however, while agreeing that the conduct of the non-struck employers would be illegal in the absence of group bargaining is made legal by joining the group.

The Court below underscored the illogic of the Board's position by the following example (R. 53).

> "The difficulty with which a union would be faced if it were placed in the dilemma set forth by the Board can easily be foreseen. For example, if a union representing automobile workers had once bargained collectively with a group representing all the automobile manufacturers, a subsequent strike against, say, the Ford Company would justify General Motors in locking out its employees, regardless of the patent fact that the anticipation of a strike against General Motors would cause it no exceptional economic hardship.
>
> Thus, if we were to accept the Board's reasoning in the instant case, in any case where there is a history of multi-employer bargaining, of the union wishes to call a strike, it must wait until it can afford to strike all the employees in the unit; for if it struck only one,

> the non-struck members of the association could lock out their employees".[17]

To establish such a situation is either to create a special class of employers or to hold that "otherwise illegal action is made legal by concert". *U. A. W. v. Wisconsin Board*, 336 U. S. 245, 258.

There is nothing in the Act or its legislative history to support such an anomoly.

The Court below (R. 54 fn. 13) gives a list of citations to the legislative history relating to multi-employer bargaining and observed that a review of that history "discloses sharp disagreement over the disirability of multi-employer bargaining".

But, said the Court, even if it be assumed that the Congress gave legislative approval to all the previous Board ruling concerning such bargaining, "still the Board at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the 'stability of the multi-employer unit'" (R. 54).

The Court below refused to overlook the fact that Congress, far from placing an imprimatur on this type of bargaining, made it abundantly clear that it was taking the matter under investigation, by setting up a joint committee under Section 402 of the Act, to study among other things,

> "the methods and procedures for best carrying out the collective bargaining process, *with special attention to the effect of industry-wide or regional bargaining upon the national economy*".

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[17] The Board's position, said the Court below, (R. 48-49) is that once a union agrees to group bargaining—"it becomes obligated to continue bargaining exclusively with the employer association, at least to the extent that, if it strikes against one member of the association, lockouts by the other members become lawful although the lockouts would otherwise be unlawful * * *".

We fail to see how even the most devoted partisan of multi-employer bargaining can seriously argue that Congress desired to favor multi-employer groups over the individual employer by giving to members of a group the right of sympathetic lockout to preserve the solidarity of the group.

The defenders of multi-employer bargaining, particularly Senators Morse and Ives, took the position that this form of collective bargaining had become customary in certain industries in particular regions and there was some evidence to show that such bargaining had a stabilizing and otherwise salutory effect. They advocated caution, and it would seem that the advice was accepted by Congress in view of the investigative approach ultimately adopted and now underway. The most that can be gleaned from the legislative history for multi-employer bargaining is that it can be tolerated. There is not a shread of evidence that the Congress even considered the possibility of permitting employers the potent weapon of sympathetic lockout to preserve the solidarity of the group.

The Board throughout its brief proceeds on a continuous assumption of a set of circumstances—bargaining inequality-full employment—etc. This series of assumptions based on observations of situations by writers without even a showing that the situations are apposite—is absolutely refuted by the testimony. There is neither claim nor proof that any of these circumstances exist.

The Board in its brief (Bd. Br. pg. 25) quotes from pamphlet written by the author of one of the briefs *amici* (Mr. Bahrs) and then observes very candidly in a footnote (idem fn. 30) that the situation described in the

text would work quite to the opposite in a depressive market.

We respectfully submit that the Board was not delegated the power to work out an economic balance with one eye on the Act and the other on the Wall Street Journal.

The Act, by requiring employees to bargain in good faith (Sec. 8(b)(3)), by establishing prerequisites before any strike or termination may occur (Sec. 8(d)) and by Section 301 of the Act making unions suable as an entity and liable as such for breach of collective agreements, has effectively limited the time in which an employer or a group of employers can be exposed to a strike.

Labor unions at considerable sacrifice to the individual members accumulate strike funds to relieve the economic hardship of a strike. It would be only fair and reasonable to limit secondary aid to a struck employer by others in the group to such a method for this would be more consonant with the basic purpose of the Act in confining the area of disputes to a given employer and his employees. Carpenter, in his work—"Employer's Associations and Collective Bargaining" suggests a number of palatable alternatives at page 214:

> "Where the association cannot divert the concentration of union forces away from the weakest spots in the line it must come to the defense of its members bearing the brunt of the attack. A member whose plant is closed by strike may be given various forms of economic support. Those who supply him may be asked to hold the materials, and his customers may be requested not to cancel orders. Or his competitors in the association may agree to take over his business on a temporary basis. They may accept his orders and handle his trade with the understanding that the business will be returned to him when the strike is over. Or the association may offer him direct

financial assistance. Recently a militant union in New York City sought to enforce its contract demands upon a well organized employers association in the restaurant industry by striking against two or three of the members at a time. But when the Union learned that the association had levied a special strike assessment upon all its members, it called off the strike and came to terms with the association".

But the lockout has a triple effect which increase to that extent its desirability:

1. It preserves the competitive position of the individual corporations.

2. It cuts off the wages of employees and disables them from supporting the strike at the plant of the struck member.

3. It discourages interest in the Union because employees are laid off because of their membership in the Union and even though they are willing to work or even voted against a strike at the plant of their own employer.

There is no gainsaying that the lockout, like the secondary boycott are effective economic weapons. Perhaps Congress may permit the use of both of them under certain conditions but the Board cannot.

The Board throughout its brief quotes and cites authorities to support the desirability of multi-employer bargaining. Perhaps they can persuade the Congress for Senator Ives stated[18], with regard to the investigation proposed under Section 402 of the Act:

"The hearings before the Senate Committee on Labor and Public Welfare, the discussions by the members of the committee among themselves, and the debate

[18] 93 Daily Cong. Rec. 479 at 4793—May 7, 1947; 2 Leg. Hist. 1283 at 1284.

now in progress on the floor of the Senate, all indicate that we do not possess a sufficient knowledge of the subject of industry-wide bargaining to enable us to adequately or satisfactorily to provide by statute at this time the remedies which ultimately must be found by which to correct the conditions which all of us recognize demand correction.

Because of this very situation in TITLE IV • • • of the bill itself there appears a special mandate to the committee • • • to study and investigate • • • the effects of industry-wide or regional bargaining upon the national economy.

• • •

I repeat, such provision in the bill itself is recognition of the fact that we have not yet found the answers to the question inherent in the problem of industry-wide bargaining".[19]

The thought may be ventured that a strong case can be made against multi-employer bargaining but that is not our purpose. We view multi-employer bargaining pragmatically without any overtones of the absolute.

No doubt Unions derive some benefit from multi-employer bargaining but protection against raiding isn't one of them. Since an employer can withdraw from the group at its whim even if there is a certification, we fail to see how the Union is protected. See cases reported in Commerce Clearing House—Labor Law Reports at paragraphs (54, 175) and (54, 187) published November 8, 1956.

Cyrus S. Ching in book "Review and Reflection"[20] covering a half-century of labor relations devotes a full chapter to the subject of "Industry Wide Bargaining" taking up one by one what he characterizes as its "pseudo-

[19] See also Sen. Taft 93 Daily Cong. Rec. 3955; 2 Leg. Hist. 1014.
[20] B. C. Forbes & Co. 1956—Chapt. 12.

advantages" and rather persuasively demonstrates that it is at best a mixed blessing.[21]

The arguments urged that if employers are denied the right of sympathetic lockout, the multi-employer bargaining will collapse did not have any persuasive effect on the Board prior to this case. Indeed, the picking off of a single member serves an excellent purpose, since it may be the recalcitrant, anti-union employer who has brought about the impasse in bargaining and is chosen for the Union attack.[22] And it has been demonstrated that a strike against one is in the public interest where multi-employer bargaining ceases to be satisfactory to both parties.[23]

There are strong and, we think, persuasive reasons against solving the multi-employer bargaining problem by permitting the use of the sympathetic lockout. Until such time, in any event, as Congress clearly resolves the problem which it has taken in hand, the National Labor Relations Board is in excess of its mandate in seeking to achieve what it conceives to be the future legislative course.

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[21] See also Wolman, *Industry Wide Bargaining*, 1 Labor Law Journal 167; 2 N. Y. U. Annual Conf. on Labor 20 (1949).
[22] See 53 Michigan Law Review 490, fn. 13.
[23] 3 Stanford Law Review 510.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

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APPENDIX

The relevant provisions of the National Labor Relations act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

Unfair Labor Practices

Sec. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: • • •

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

• • •

Limitations

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~964~~ 103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
TRUCK DRIVERS LOCAL UNION No. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR LINEN AND CREDIT EXCHANGE, OMAHA-COUNCIL BLUFFS BAKERY EMPLOYERS LABOR COUNCIL, BAY AREA COUNCIL OF BAKERY OPERATORS, BOSTON BAKERY EMPLOYERS LABOR COUNCIL, CHICAGO BAKERY EMPLOYERS LABOR COUNCIL, SEATTLE BAKERS' BUREAU, BAKERS OF WASHINGTON, INC., NEW YORK CITY BAKERY EMPLOYERS LABOR COUNCIL, FEDERATED EMPLOYERS OF NEVADA, INC., GREATER NEW YORK AND NORTHERN NEW JERSEY MILK DEALERS' LABOR COMMITTEE, SAN FRANCISCO RETAILERS COUNCIL, AS AMICI CURIAE, IN SUPPORT OF PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, *v.* TRUCK DRIVERS LOCAL UNION No. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.	No. 964

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR LINEN AND CREDIT EXCHANGE, OMAHA-COUNCIL BLUFFS BAKERY EMPLOYERS LABOR COUNCIL, BAY AREA COUNCIL OF BAKERY OPERATORS, BOSTON BAKERY EMPLOYERS LABOR COUNCIL, CHICAGO BAKERY EMPLOYERS LABOR COUNCIL, SEATTLE BAKERS' BUREAU, BAKERS OF WASHINGTON, INC., NEW YORK CITY BAKERY EMPLOYERS LABOR COUNCIL, FEDERATED EMPLOYERS OF NEVADA, INC., GREATER NEW YORK AND NORTHERN NEW JERSEY MILK DEALERS' LABOR COMMITTEE, SAN FRANCISCO RETAILERS COUNCIL, AS AMICI CURIAE, IN SUPPORT OF PETITION

Pursuant to written consents of the parties, which have been filed with the Clerk of this Court in accordance with Rule 42(1), the above-named multi-employer associations

respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari herein.

INTEREST OF AMICI CURIAE

The first named *amicus curiae,* the Linen and Credit Exchange (hereinafter referred to as the "Exchange"), is involved directly in this case. It is a local multi-employer association for the Buffalo metropolitan area which for thirteen years has negotiated on behalf of its members collective bargaining agreements with unions representing their employees. The other *amici curiae* are similar multi-employer bargaining associations which for many years have negotiated for their members in various cities or metropolitan areas throughout the United States.

In the instant case the union involved, Truck Drivers Local Union No. 449, was an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL and had been negotiating with the Exchange. While the union was continuing to bargain collectively with the Exchange it called a strike against one of the Exchange's members in support of its demands against all of them. Ultimately an agreement between the Exchange, on behalf of all of its members, and the union on matters covered by the bargaining was reached. When the strike at the plant of a single member was called, the other members of the Exchange as a defense against the economic results of this action temporarily laid off their employees. The National Labor Relations Board found this course legal and proper. *Buffalo Linen Supply Company,* 109 NLRB 447 (1954). However, the Court of Appeals for the Second Circuit held that this lay-off was improper.*

*See Petition, p. 2-8, for statement of facts.

The Exchange is aggrieved by the decision of the Court of Appeals since the finding of an unfair labor practice may subject some of its members to liability for back pay for the period of the temporary lay-off. Furthermore, the other *amici,* as well as the Exchange, fear that the decision below, in permitting the union to disregard the employers' association and in denying the right to a temporary defensive lay-off, will destroy the multi-employer bargaining concept which has operated to the advantage of employee, union, employer and the public, and will confuse and jeopardize the settlement of labor disputes in their respective localities.

ARGUMENT

POINT I

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS BELOW HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.

The decision of the Court below is in direct conflict with the decisions of the Courts of Appeals for the Seventh, Eighth and Ninth Circuits on the same question. *Morand Bros. Beverage Co.* v. *National Labor Rel. Bd.,* 7 Cir., 190 F. 2d 576 (1951), 204 F. 2d 529 (1953), *cert. den.* 346 U. S. 909 (1953); *Leonard* v. *National Labor Relations Board,* 9 Cir., 197 F. 2d 435 (1952), 205 F. 2d 355 (1953); *National Labor Rel. Bd.* v. *Spalding Avery Lumber Co.,* 8 Cir., 220 F. 2d 673 (1955); *National Labor Relations Bd.* v. *Continental Baking Co.,* 8 Cir., 221 F. 2d 427 (1955).

Unanimous courts in the *Leonard, Spalding Avery* and *Continental Baking* cases, *supra,* held that where a union struck one or some members of an employers' association,

the use of a temporary lay-off by the other members as a defense to such a strike, under circumstances similar to those of the instant case, did not violate the Labor Management Relations Act, 1947 (61 Stat. 136, ch. 120, 29 U. S. C. Supp. III, § 141). In the *Continental Baking* case, in fact, the Court specifically followed the decision of the National Labor Relations Board which was reversed in the instant case. *Buffalo Linen Supply Company,* 109 NLRB 447 (1954).

In the *Morand* case, the unanimous Court, although it ultimately held that a permanent discharge of employees was unlawful, clearly decided that when the union struck one member of an employer association the Act permitted a temporary lay-off as the employers' means of exerting economic pressure on the union and as a corollary of the union's right to strike.

The Court of Appeals below, in reversing the Board, recognized the conflict between the Ninth Circuit and itself when it stated, "In the instant case, the Board departed from its previous position by adopting the position of the Ninth Circuit in Leonard v. N. L. R. B. * * *" (231 F. 2d 110, 113).

In summary, twelve Court of Appeals judges who considered the question, including Judge Waterman who dissented in the instant case, have adopted a view contrary to that of the two judges who constituted the majority in the Court below.

These conflicting determinations of an important question arising under the same federal statute create an atmosphere of doubt and confusion jeopardizing relationships among millions of workers and thousands of employers. The matter can be clarified only by a decision of this Court.

POINT II

THE QUESTION CONCERNING THE RIGHT OF MEMBERS OF AN ESTABLISHED MULTI-EMPLOYER ASSOCIATION TO LAY OFF EMPLOYEES TEMPORARILY UNDER CIRCUMSTANCES SIMILAR TO THOSE IN THE INSTANT CASE, FOLLOWING A STRIKE AT THE PLANT OF ONE EMPLOYER MEMBER, IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Employer members of multi-employer associations would, under the decision of the Court below, be deprived of their right to act together in resisting a strike at the plant of one of the members of the association. Thus, that decision threatens the survival of the whole concept of multi-employer bargaining and, as a consequence, jeopardizes the principle of equality of bargaining position, which is so fundamental to the labor law.

A. The Nature and Extent of Multi-Employer Bargaining

Multi-employer bargaining groups have existed since as early as the 1880's, and their growth has closely paralleled the growth of union strength. A most significant expansion of these groups came in the 1930's when labor emerged as a major force under the impetus of the Wagner Act. *Collective Bargaining with Associations and Groups of Employers*, 1947, *B. L. S. Bulletin No. 897*, p. 1; Carpenter, *Employers' Associations and Collective Bargaining in New York City* (1950) p. 28-9; Freidin, *The Taft-Hartley Act and Multi-Employer Bargaining* (U. of Pa. Press, 1948) p. 4-5; Pierson, *Multi-Employer Bargaining: Nature and Scope* (U. of Pa. Press, 1948) p. 17, 35-6.

By 1953 there were as many as 5,000,000 employees involved in multi-employer bargaining, over one-half of whom bargained at the local level with about 5,000 local or city employer associations throughout the country.* *Collective Bargaining Structures: The Employer Bargaining Unit*, 1953, *B. L. S. Report No. 1*, p. 2, 8-11; *B. L. S. Bulletin No. 897, supra*, p. 13; Backman, *Multi-Employer Bargaining* (N. Y. U. Inst. of Labor Relations and Social Security, 1951), p. 10; Taft, *Economics and Problems of Labor* (1949), p. 609; Jones, *The NLRB and the Multi-employer Unit*, 5 Labor Law Journal 34 (Jan. 1954); Pierson, *op. cit. supra*, p. 48-51.

In 1951, 40% or more of the employee members of each of 59 unions, including such unions as the Teamsters and the Bakery and Confectionery Workers' International Union of America, were represented in bargaining of the multi-employer type. Many other large unions had from 80% to 100% of their members so represented. *B. L. S. Report No. 1, supra*, p. 10-11; *Directory of National and International Labor Unions in the United States, 1955, B. L. S. Bulletin 1185*, p. 27, 28, 31, 32, 41.

The technique of local multi-employer bargaining is not rigid in form. In general, employers in a particular industry in a local area form an association, such as the Exchange in this case, for the purpose of collective bargaining with unions. Such bargaining associations represent their respective members in negotiations and in drafting contracts

*If the coal and railroad industry, which accounts for 90% of the total bargaining at a national level, is disregarded, it will be perceived that local area multi-employer bargaining is by far the most significant type and that national bargaining, with the exceptions noted, is relatively infrequent. Backman, *Multi-Employer Bargaining* (N. Y. U. Inst. of Labor Relations and Social Security, 1951), p. 10.

which become binding on all members, sometimes upon acceptance by a majority. The multi-employer group also frequently undertakes the task of administering the contract. *B. L. S. Report No. 1, supra,* p. 1-2; Carpenter, *op. cit. supra,* p. 292 *et seq.*, 373.

Multi-employer bargaining is utilized particularly in such local industries as personal services, baking, printing, clothing, textiles, trucking and warehousing, hotel and restaurant, dairy products, construction, retailing and beverages. These and other such industries are usually characterized by numerous small and moderately sized employers selling in local product markets. Such local industries engaged in multi-employer bargaining have enjoyed relative labor peace in recent years. Manifestly, many unions favor the multi-employer procedure. *B. L. S. Bulletin No. 897, supra,* pp. 3, 12-3; *B. L. S. Report No. 1, supra,* p. 8; Pierson, *op. cit. supra,* p. 34, p. 34 fn 3; Backman, *op. cit. supra,* p. 8, 9, 16, 34, 43, 46; Burke, *Negotiating Problems of the Building Industry,* Kaplan, *Negotiating Problems of the Trucking Industry,* Proceedings of the Conference on Industry-Wide Collective Bargaining (U. of Pa. Press, 1949) p. 75, 81, 84, 87; Carpenter, *op. cit. supra,* p. 2-5, 66, 368-9; Taft, *op. cit. supra,* p. 614.

The widespread utilization of multi-employer bargaining, as described above, illustrates the fact that the decision of the court below and any decision which this Court might render on review, will have a vital impact not only on the interests of these *amici* and their employees, but also upon the entire fabric of collective bargaining, particularly at the local level, throughout the United States.

B. The Multi-Employer Group is Vital to Equality at the Bargaining Table and Affords Other Advantages to Both Parties

We submit that the decision of the Court of Appeals for the Second Circuit is contrary to the intention of Congress, which, in enacting the Labor Management Relations Act, 1947, sought to equalize bargaining power. As stated in the Senate Report on this legislation *(Senate Miscellaneous Reports, Federal Labor Relations Act of 1947,* 80th Cong., 1st Sess., Vol. I, Report 105, Part 1, p. 2):

> "The committee bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining."

The "Short Title and Declaration of Policy" in the Labor Management Relations Act, 1947, and the "Findings and Policies" inserted in Section 1 of the National Labor Relations Act, as amended, also express fully the intent of Congress to equalize collective bargaining (61 Stat. 136, 29 U. S. C. Supp. III, §§ 141, 151).

Multi-employer bargaining assures a measure of equality in bargaining position between labor and management, thus contributing to the fulfillment of the basic aim of the labor law. Carpenter, *op. cit. supra,* p. 8, 365-9; Pierson, *op. cit. supra,* p. 17-8; Jones, *op. cit. supra,* p. 34; Zorn, *Multi-Plant and Multi-Employer Bargaining,* N. Y. U. Sixth Annual Conference on Labor (1953) p. 401; Newman, *Union Responsibilities (Including Suits Against Unions),* N. Y. U. Seventh Annual Conference on Labor (1954) p. 312-3; *Senate Miscellaneous Reports, Federal Labor Relations Act of 1947,* 80th Cong., 1st Sess., Vol. I, Report 105, Part 2, p. 7.

Another real advantage of group bargaining is that it gives the small employer a voice, which he would otherwise not have, in the negotiation of labor contracts. All too often the alternative to multi-employer bargaining is not single employer bargaining but "pattern bargaining" or presentation of form contracts on a "take it or leave it" basis. As Professor Carpenter, *op. cit. supra,* p. 12—after an exhaustive analysis of bargaining in New York City—said, single-shop bargaining is a "myth".

In the absence of association bargaining, the union may single out a particularly vulnerable employer and obtain from him the terms it desires and then attempt to impose those terms on other employers in the area, one by one, without bona fide collective bargaining with those employers, or the union may ignore any meaningful bargaining and present each employer with a pre-prepared agreement. Kaplan, *Negotiating Problems of the Trucking Industry,* Burke, *Negotiating Problems of the Building Industry,* Witte, *An Institutional Approach,* Proceedings of the Conference on Industry-Wide Collective Bargaining (U. of Pa. Press, 1949) p. 21, 28, 33, 74, 75-6, 81, 87; Jones, *op. cit. supra,* p. 45, fn. 90; Carpenter, *op. cit. supra,* p. 10-14; Somers, *The Multi-Employer Proposals and the Coal Operators,* 6 Labor Law Journal 296, 310 (May 1955); Backman, *op. cit. supra,* p. 9, 13-14; Lester, in *Hearings Before Joint Committee on Labor-Management Relations,* 80th Cong., 2nd Sess., *On the Operation of the Labor-Management Relations Act* (1948), Part 2, p. 912.

David Kaplan, when chief economist for the Teamsters, stated the issue forcefully in *Negotiating Problems of the Trucking Industry, supra,* before the Conference on Industry-Wide Collective Bargaining (at p. 87):

> "* * * if the employers really want any representation in collective bargaining, they have to get that participation through some group. Otherwise, we would have to make the contract with those employers who could get together as a group and then we would have no other alternative but to impose that same contract on everyone else.
>
> "So I think that in the type of industries that I am discussing now [*e.g.*, local trucking industry]—it isn't a question of this or that type of bargaining—but it is merely a question of multi-employer bargaining, or no bargaining at all."

There can, therefore, be no equality and consequently no real bargaining on any basis other than a group basis where a local industry is composed of a substantial number of relatively small and moderately sized employers or employer establishments.

Multi-employer bargaining has many other advantages. For example, union bargaining with a local employers unit is practical. It facilitates negotiation and administration, reduces the expense of bargaining, minimizes union raiding, makes available to both sides the talents of more experienced personnel and establishes uniform principles applicable to all members of the group. Carpenter, *op. cit. supra,* p. 12-13, 48-9, 61; Jones, *op. cit. supra,* p. 34; Somers, *op. cit. supra,* p. 310; Kaplan, *op. cit. supra,* p. 87; *Senate Miscellaneous Reports, supra,* p. 7.

Stabilization of wages and standardization of working conditions, which are among the primary aims of the labor movement, are promoted by local group bargaining. Such bargaining has been a major factor in the elimination of sweat shop conditions and competitive wage cutting in periods of slump. Witte, *op. cit. supra,* p. 28; Freidin,

op. cit. supra, p. 5, fn. 5, 13-4; *In the Matter of Admiar Rubber Company,* 9 NLRB 407, 415-6 (1938); *Brunswig Drug Company,* 71 NLRB 309, 312 (1946); Burke, *op. cit. supra,* p. 75; Carpenter, *op. cit. supra,* p. 51-2, 243-4, 368-9; Newman, *op. cit. supra,* p. 312-3; Jones, *op cit. supra,* p. 34.

C. The Decision of the Court Below Threatens the Continued Existence of Local Multi-Employer Bargaining

Multi-employer groups function only for the purpose of collective bargaining and the administration of the resulting labor contract. There is no other reason for their existence. A strike against one member of a group is in reality a strike against all, and a temporary lay-off as a defense to such a strike is the group's only adequate remedy. Unless the employers can function as a group, the very reason for the group vanishes. The principle of equality at the bargaining table likewise is sacrificed with the dissolution of the group.

We respectfully submit that approval should not be granted to restrictions having the effect of eradicating multi-employer bargaining, a concept widely praised, particularly at the local level, by representatives of labor, students of the subject and industrial leaders alike.*

---

*E. g., Carpenter, *op. cit. supra,* p. 366-9; Jones, *op. cit. supra,* p. 45-6; Pierson, *op. cit. supra,* p. 33-6; Bahrs, *The San Francisco Employers' Council* (U. of Pa. Press, 1948); Burke, *op. cit. supra,* p. 74; Kaplan, *op. cit. supra,* p. 81; Witte, *op. cit. supra,* p. 21; Freidin, *op. cit. supra,* p. 5; Backman, *op. cit. supra,* p. 9; *House Hearings, Education & Labor Committee,* 83rd Cong., 1st Sess. (1953), *Matters Relating to The Labor-Management Relations Act of 1947,* Part 3, p. 1024, Part 4, p. 1177, 1180, Part 7, p. 2450-3; Zorn, *op. cit. supra,* p. 401; Newman, *op. cit. supra,* p. 312-3; *Senate Miscellaneous Reports, supra,* p. 6-7; *Hearings Before Joint Committee on Labor-Management Relations,* 80th Cong., 2nd Sess., *On the Operation of the Labor-Management Relations Act* (1948), Part 2, p. 912-14.

We therefore respectfully submit that because of (1) the established legality in the 7th, 8th and 9th Circuits of a temporary lay-off such as that employed by the members of the Exchange in this case, (2) the importance of local multi-employer bargaining in the national economy and (3) the compelling need for an authoritative interpretation of the Act by the Supreme Court, both to clarify the chaotic situation created by the conflict of the Circuits and to settle the rights and privileges of the parties in this important area of labor relations, the decision of the Court of Appeals for the Second Circuit should be reviewed.

CONCLUSION

For the foregoing reasons, the writ prayed for should be granted.

Dated: May 23, 1956.

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In the Supreme Court
OF THE
United States

October Term, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L.

BRIEF OF AMICI CURIAE

Bay Area Council of Bakery Operators,
California Metal Trades Association,
California Processors and Growers, Inc.,
General California Chapter, The Associated General Contractors of America, Inc.,
Distributors Association of Northern California,
Employers Council of Santa Clara Valley,
Federated Employers of San Francisco,
Foundry Employers Association,
Retail Furniture Council of San Francisco,
Sacramento Valley Associated Industries,
San Francisco Employers Council,
San Francisco Retailers Council,
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L.,

BRIEF OF AMICI CURIAE,

Bay Area Council of Bakery Operators,
California Metal Trades Association,
California Processors and Growers, Inc.,
Central California Chapter, The Associated General Contractors of America, Inc.,
Distributors Association of Northern California,
Employers Council of Santa Clara Valley,
Federated Employers of San Francisco,
Pacific Maritime Association,
Retail Furniture Council of San Francisco,
Sacramento Valley Associated Industries,
San Francisco Employers Council,
San Francisco Retailers Council,
San Joaquin County Industrial Association,
United Employers Incorporated.

INTEREST OF AMICI CURIAE.

The written consent of the parties has been filed with the Clerk of this Court pursuant to Rule 42(2). This brief is being filed in support of Petitioner.

All of the Amici represented herein are employer associations engaged in multi-employer collective bargaining with labor organizations representing the employees of their members.

The employers represented by this brief believe that if the decision of the court below is upheld by this court it will mean not only the end of all multiple-employer bargaining but of substantially all genuine collective bargaining not only on the Pacific Coast but throughout the country.

This, of course, would be of no concern to this court if the statute prohibited lockouts in unmistakably clear language. Here, however, the court below itself concedes that there is no express prohibition against lockouts. In order to arrive at its conclusion that the lockout here involved is illegal the court below relies on general prohibitions against "interference" with and "coercion" of employees, and, in effect, decides that *any* resistance to a strike is an unfair labor practice because such resistance constitutes an interference with "protected concerted activities".

Collective bargaining could not survive under such a one-sided set of rules, and thus we say that the result of the decision below is contrary to the whole purpose and intent of the Act.

This can readily be demonstrated. Unions such as the Longshoremen's, the Sailors', the Teamsters', and

various Metal Trades Unions have contracts covering the entire Pacific Coast. To rule that such a union may bargain on a multi-employer basis and may then strike against the members of an employer group one at a time but that the other employers may not shut down in support of the struck employer means the end of all such employer associations. This is for the reason that the very basis of their existence has been destroyed.

If the employers are thus scattered to the winds the bargaining resulting from pitting an individual employer against a union of this size would be as unrealistic as the bargaining between a large and powerful employer and an individual employee. With all the bargaining and economic strength on one side and with virtually no power to resist on the other the result would be "runaway" increases in labor costs with rival labor leaders being forced to attempt to outdo one another. If left to run its course this would be very bad for the welfare of the country and contrary to the declared policy of the statute to encourage the practice and procedure of collective bargaining "by restoring equality of bargaining power between employers and employees." (LMRA 1947 Sec. 1.)

The only alternative to the inflationary results of such disparity in strength between the large union and the individual employer would be to cut the union down to the size of the individual employer. This is exactly what was attempted prior to and during the enactment of the Taft-Hartley Act.

Representatives of some of the employer associations now appearing on this brief, being convinced that such a proposal was a disservice to collective bargaining, testified before Congress in opposition to such proposal and in favor of the continuation of multiple-employer bargaining as it had been practiced for many years on the Pacific Coast.[1]

They are now before this court reaffirming their beliefs that multiple employer bargaining is the appropriate manner in which to achieve the "equality of bargaining power between employers and employees" declared to be one of the objects of the 1947 revision of the statute rather than chopping up all unions, and further, that the right to shut down in support of a struck employer is indispensable to multiple-employer bargaining.

The court below frankly admits that there are no provisions of the statute specifically outlawing employer lockouts such as were involved here. To arrive at its conclusion that such lockouts were illegal the court was obliged to lump together and to treat alike both "economic" lockouts to resist wage increases and "unfair labor practice" lockouts to interfere with the rights of employees to organize and bargain collectively.

We quote the following passages from the opinion below as follows:

---

[1]See references to Legislative History of Taft-Hartley Act in Appendix hereto, pp. i-iv.

"No provision of the LMRA of 1947 by its terms generally specifically prohibits or authorizes lockouts by employers."

* * * * * * *

"In addition, paragraph 7 of the Act guarantees employees the right to engage in 'concerted activities' for 'their mutual aid or protection;' and it has been held that the right to strike and to support a strike constitutes 'concerted activity' which is protected by the statute. Interference with this right by the employer constitutes an unfair labor practice under Section 8 (a) (1) of the Act, and *a lockout prompted by a purpose to defeat employee organization or otherwise protected concerted activities is violative of the Act.* Such a lockout would also violate Section 8 (a) (3) of the Act." (Emphasis supplied.)

On the theory that the lockout in this case was prompted by a purpose to defeat "otherwise protected concerted activities", namely, the well recognized and well understood "whipsawing" process of picking off employers one at a time, the court declared that the lockout by the members of the multi-employer bargaining group in support of a struck employer was an unfair labor practice.

It will be the purpose of this brief to demonstrate the fallacy of the reasoning of the court below. In doing so, however, we will not add to the burden of this court by repeating what has been so well said in the dissenting opinion below, in the opinions of the other circuit courts, and in the opinion of the Board below.

OUTLINE OF ARGUMENT.

It will be our purpose to demonstrate the following propositions:

1. The lockout is not *per se* illegal but is as legitimate as the strike. Both the strike and the lockout may be lawful or unlawful depending on their purpose or object. In this case a lockout in support of a struck member of a multi-employer bargaining group is for a legitimate purpose.

2. The lockout is recognized as a legitimate tactic in the statute. There would be no purpose in specifying a sixty-day cooling off period if the lockout were *per se* unlawful.

3. The term "lockout" is used in the statute in its common-law sense and is not limited to employer shutdowns to save themselves from business losses.

4. The lockout is recognized as a legitimate procedure by organized labor which has repeatedly agreed that in case of a deadlock or impasse in the process of collective bargaining either side is free to strike or lock out as the case may be. In such cases, of course, the parties used the term lockout in its common-law sense and not in the restricted sense suggested by the court below.

5. The lockout has been recognized as a legitimate and necessary adjunct of multi-employer bargaining by impartial public officials who have had many years of intimate acquaintance with

the day-to-day rough and tumble process of collective bargaining.

6. While it is true that Congress did not specifically endorse multi-employer bargaining, it did nevertheless intend to recognize and preserve multi-employer bargaining as it was then being practiced by refusing to amend the statute in ways which would weaken multi-employer bargaining and which would remove the protection of the law from a multi-employer bargaining unit.

---

1. THE LOCKOUT IS NOT PER SE ILLEGAL BUT IS AS LEGITIMATE AS THE STRIKE, BOTH THE STRIKE AND THE LOCKOUT MAY BE LAWFUL OR UNLAWFUL DEPENDING ON THE PURPOSE OR OBJECT.

In considering the question whether the lockout constitutes an unfair labor practice it must constantly be borne in mind that the statute nowhere expressly forbids it. On the contrary the statute expressly recognizes that lockouts do occur in industrial disputes and inferentially recognizes that they are legal and legitimate by prescribing a waiting period before they take place which would, of course, be unnecessary were the lockout illegal.

The court below seeks to bolster its reasoning by the fact that nowhere does the statute expressly declare or preserve the right to lock out, whereas, on the other hand, it does expressly declare and preserve the right to strike. However the instances in which strikes themselves are unfair labo-

practices are too numerous to list here. A strike may or may not be legal according to its purpose and object. The same is true of the lockout.

The Ninth Circuit Court in the *Davis Furniture* case[2] was careful to make clear that it had not granted a blanket immunity or protection of all lockouts. We are here concerned only with a lockout in support of a struck member of a multi-employer bargaining group.

The legality of the lockout depends upon its purpose or object. If the object is to interfere with the rights of employees to organize or to bargain collectively, obviously the object is contrary to and forbidden by the statute. Where, however, the lockout occurs as a result of a deadlock or stalemate or impasse in collective bargaining over economic issues, such as higher wages, shorter hours, fringe benefits and the like, the lockout in support of a struck member under the circumstances of this case can only be declared unlawful on the theory that it is an interference with protected concerted activities. Such a conclusion could not be reached without also logically concluding that *any* resistance to a strike would also constitute an interference with "protected concerted activities".

This is indeed a *reductio ad absurdum*. If such were the law there would be no collective bargaining. In order to preserve the process of collective bargaining it must be declared that such is not the law.

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[2]205 F. 2d 355.

2. THE LOCKOUT IS RECOGNIZED AS A LEGITIMATE TACTIC IN THE STATUTE. THERE WOULD BE NO PURPOSE IN SPECIFYING A SIXTY-DAY COOLING OFF PERIOD IF THE LOCKOUT WERE PER SE UNLAWFUL.

The opinion of the Ninth Circuit Court in the *Davis Furniture* case[3] lists the many instances in legislative history where the terms "strike" and "lockout" are used in conjunction with one another and also where the terms "strike" and "lockout" appear in the statute together.

It is submitted that if the lockout were *per se* unlawful all of the references to lockouts in connection with the sixty-day cooling off period and with national emergency work stoppages would be superfluous and unnecessary.

The only way to give these statutory provisions a reasonable or sensible construction or interpretation is on the theory that Congress has *recognized* the lockout as a legitimate and permissible weapon to be employed in collective bargaining but has placed statutory limits upon its use.

---

3. THE TERM "LOCKOUT" IS USED IN THE STATUTE IN ITS COMMON-LAW SENSE AND IS NOT LIMITED TO EMPLOYER SHUTDOWNS TO SAVE THEMSELVES FROM BUSINESS LOSSES.

Continuing the discussion from the previous subheading, it is likewise impossible to give the statute a reasonable or sensible interpretation if the term "lockout" is limited to the few cases which the court below has listed as permissible.

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[3]205 F. 2d 355.

To limit the cases where an employer may lock out to a situation where the employer is desirous of saving a few dollars of flavoring syrup from spoilage as in the *Duluth Bottling Association*[4] case, or where the employers do not wish to disappoint their customers whose automobiles they have received for repair as in the *Betts Cadillac Olds*[5] case, or because prospective work stoppages threaten to be of a recurrent nature so that it is difficult for the employer to plan production as in the *International Shoe*[6] case, is a forced, unnatural and unrealistic interpretation and application of the word "lockout". Yet these appear to be the *only cases* in which the court below would permit an employer to shut down because of concerted activities by his employees. There is not a word in the entire Legislative History to justify such interpretation. Certainly none was cited or referred to by the court below.

It is much more reasonable to suppose that the term "lockout" as used in the statute was employed in its well known and well understood common-law sense; that is to say, the sense in which it had been employed for many years prior to the enactment of the Taft-Hartley Act.

For example, the term "lockout" is defined as follows:

> "'A lockout is an employer's withholding of work from his employees in order to gain a con-

[4] 48 NLRB 1335, 12 LRRM 15.
[5] 93 NLRB 907, 27 LRRM 1504.
[6] 96 NLRB 268, 28 LRRM 1509.

cession from them. It is the employer's counterpart of a strike.'

"Restatement of Torts, Sec. 788, Comment subdiv. (a)"

"'* * * A lockout is a temporary withholding of work from a group of employees by an employer (or group of employers) in order to coerce them into accepting the employer's terms.'

"Bulletin U.S. Dept. of Labor, Bureau of Labor Statistics No. 651."

Perhaps the classic legal definition of lockout is to be found in *Iron Molders Union v. Allis-Chalmers,* 166 Fed. 45 at page 52, where the concurring opinion of Judge Grosscup reads in part as follows:

"A strike is a cessation of work by employees in an effort to get for the employees more desirable terms. A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms."

This definition is quoted with approval in

Jeffry-Dewitt Insulator Co. v. N.L.R.B., 91 Fed. 2d 134 at 137.

In *Magner v. Kinney,* 141 Nebraska 122, 2 N.W. 689, the court also repeats the definition of strike and lockout from *Iron Molders Union v. Allis-Chalmers* and adds the following:

"We understand in labor disputes, to 'lock out' is 'to withhold employment from (a body of employees) as a means of bringing them to accept the employer's terms.'"

Citing *Webster's New International Dictionary Second Edition* 1450.

In addition to numerous judicial definitions, the lay or popular definitions of lockouts are equally clear, concise and consistent. For example, the term "lockout" is defined as follows:

"*Lockout*—The discontinuance of operation in one or more plants by employers acting individually or collectively in order to resist labor demands or to enforce the acceptance of conditions of labor by employees. Refusal to continue to give employment to a group of workmen."

Labor Terminology; Bureau of Business Research, Harvard University, pp. 50, 51, 74 and 85; also 79.

"*Lockout*—Withholding of work from employees by an employer (or a group of employers) in order to coerce them into accepting the employer's terms."

The Management Almanac 1946.
National Industrial Conference Board, pp. 323, 324, 326 and 327.

"*Lockout*—Closing down of a business as a form of economic pressure by an employer to enforce acceptance of his terms."

Primer of Industrial Relations, The Bureau of National Affairs, Inc., pp. 58, 61 and 62.

4. THE LOCKOUT IS RECOGNIZED AS A LEGITIMATE PROCEDURE BY ORGANIZED LABOR WHICH HAS REPEATEDLY AGREED THAT IN CASE OF A DEADLOCK OR IMPASSE IN THE PROCESS OF COLLECTIVE BARGAINING EITHER SIDE IS FREE TO STRIKE OR LOCK OUT AS THE CASE MAY BE. IN SUCH CASES, OF COURSE, THE PARTIES USED THE TERM LOCKOUT IN ITS COMMON-LAW SENSE AND NOT IN THE RESTRICTED SENSE SUGGESTED BY THE COURT BELOW.

The distinction between an attempt to resist an economic strike and an attempt to break up a union or to interfere with employees' rights to engage in collective bargaining is so clear as to be unmistakable. Organized labor has no difficulty in seeing this distinction. While organized labor would never accede to employer efforts to break up unions or to interfere with collective bargaining, it freely concedes the right of employers to lock out on economic issues. A few examples may be worthwhile.

In the largest and one of the most important contracts in the United States, to wit, the contract affecting the basic steel industry, appears the following language:

> "If the parties shall not agree with respect to insurance and pensions by midnight of June 30, 1959, either party may thereafter resort to strike or lockout, as the case may be, in support of its position in respect to such matter as well as any other matter in dispute."

Similar language appeared in earlier contracts of the parties.

Examples of similar language employed in *multiple-employer* contracts can be cited almost without num-

ber. For example, the agreement between Warehouse Union Locals Nos. 6 and 17 affiliated with the Longshoremen's and Warehousemen's Union and Distributors Association of Northern California contains the following language:

> "In the further event that this agreement is reopened as hereinabove provided (in 1956 or 1957) and the parties are unable to reach an agreement, the Union shall have the right to strike and the Association the right to lock out on the matter or matters which were properly opened in accordance with this agreement * * *."

Another example may be found in the multiple-employer contract between Department Store Employees Union Local No. 1100, Retail Clerks International Association and San Francisco Retailers Council, reading in part as follows:

> "In the event the contract is so re-opened for negotiations on any or all of the issues above enumerated and the parties are unable to reach an agreement thereon then the Union shall have the right to strike and the employers the right to lock out on the issues then subject to re-opening and all other provisions of this contract shall remain in effect."

While the Local Union which instigated the proceeding below is an affiliate of the Teamsters International, it is noteworthy that other Teamster Locals consider the lockout to be a legitimate device in multiple-employer collective bargaining. For example, we reproduce the language of Section 28 of the collective bargaining agreement covering the produce

markets in the San Francisco Bay area, this being a multi-employer bargaining contract with Commission Market Drivers, Salesmen & Helpers Local Union No. 280, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America:

> "(b) This agreement may be opened for negotiation on vacations (Section 9) on February 1, 1958, by the giving of the notice as set forth hereafter. Wages, as set forth in Section 3, may only be opened for negotiation if the Consumer Price Index has risen in an amount which would permit a wage adjustment of 50¢ per day (rounded off) or more and to negotiate such permissible amount, upon either party giving written notice of its desire to open not more than ninety (90) nor less than sixty (60) days prior to February 1, 1958. If no such notice is given, there shall be no opening until February 1, 1959. In the event this agreement is opened for the negotiation of vacations or wage rates, and the parties are unable to reach an agreement, the Union shall have the right to strike and the Employer shall have the right to lockout."

We also submit language appearing in a collective bargaining agreement between United Parcel Service, Portland, Oregon, and General Teamsters Auto Truck Drivers and Helpers Local Union No. 162 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America:

> "This agreement shall be effective from the 1st day of August, 1956, and from year to year thereafter unless either party to this agreement

serves notice as provided for herein. If either party wishes to modify or terminate this agreement, it shall serve notice of such intention upon the other party sixty days prior to the expiration or subsequent anniversary date. If any such notice to modify or terminate is served the Union shall be free to strike or the employers to lockout after the expiration date or subsequent anniversary date. All future agreements whether new or modifications of this agreement shall be retroactive to the expiration date or subsequent anniversary date of the previous agreement, if reached amicably and without resort to work stoppage, strike or lockout on the part of either party."

The same language also appears in a contract between Olds, Wortman & King and Dohrmann Commercial Company and Warehousemen's Union Local No. 206 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of Portland, Oregon.

When organized labor itself agrees that the lockout is a permissible and legitimate tactic in an economic strike (as distinguished from an attempt to prevent unionization or to prevent collective bargaining), it is difficult to see how the court below concluded that such a lockout constituted an "interference" with collective activities and "discouraged" union membership.

We wish to emphasize once more that as the term was used in the agreements above quoted it was used in its well understood common-law sense and not in

the restricted sense which the court below has indicated is the only one in which the lockout may be considered legal.

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5. THE LOCKOUT HAS BEEN RECOGNIZED AS A LEGITIMATE AND NECESSARY ADJUNCT OF MULTI-EMPLOYER BARGAINING BY IMPARTIAL PUBLIC OFFICIALS WHO HAVE HAD MANY YEARS OF INTIMATE ACQUAINTANCE WITH THE DAY-TO-DAY ROUGH AND TUMBLE PROCESS OF COLLECTIVE BARGAINING.

We have taken the liberty of setting forth below statements of two distinguished public servants. We would not do so in ordinary cases of statutory construction or interpretation but believe that it is appropriate and may be helpful to the court in this case in reviewing the decision of the court below based solely on that court's concept of what constitutes an unlawful "interference" with "protected concerted activities".

We have selected statements from the former chairman of the National War Labor Board and the former chairman of the National Labor Relations Board and of the National Mediation Board. Both of these distinguished gentlemen have had "ringside seats" in some of the most important collective bargaining in the industrial history of this country. Both are sympathetic to the aims and objectives of organized labor, but, above all, are devoted to the common good and the public welfare. Both believe profoundly that if collective bargaining is to be preserved it should not be by cutting down the size or strength of labor organizations but by encouraging employer organiza-

tions to match the economic strength of the unions with which they bargain.

When the campaign to outlaw industry-wide bargaining was at its height in 1947 the Institute of Industrial Relations of the University of California held a conference to consider Industrial Disputes and the Public Interest. At this conference, in March 1947, William M. Leiserson, formerly a member of the National Labor Relations Board and chairman of the National Mediation Board, read a paper on "The Role of Government in Industrial Relations" in which he said, among other things:

> "The National Labor Relations Act has freed the forces that make for union organization and collective bargaining, and thereby it has contributed greatly to the private industrial law-making through which government control is made practical and effective. Its basic provisions must therefore be retained, and government policy grounded in them. But the Act has also developed some abuses which obstruct rather than promote agreement between labor and management. It is folly, therefore, to hold that no changes in it are necessary. *But if the collective bargaining policy is to achieve its purposes, any amendments made must strengthen such bargaining, not weaken it. The public interest requires collective bargaining to be strengthened if it wants to avoid dictation either by management or by government officials.* Private interests would be furthered if the collective bargaining policy were weakened.
>
> "To strengthen this policy, therefore, an amendment is needed that will require unions to bargain collectively, as well as employers. On

the assumption that unions exist primarily for bargaining purposes, — which is true enough — the obligation was imposed only on employers. But this stimulated a take-it-or-leave-it attitude on the part of not a few unions, and the omission needs to be corrected.

"Similarly the Act does not make it an unfair labor practice for a union to discriminate against employers who form or join employers' associations. *Neither does it encourage organization among employers as it does among working people. There is no good reason why the Act should not treat management and labor alike in these respects, and an amendment to this effect would strengthen the bargaining policy.* To make sure of such equal treatment, some countries define labor unions as organizations either of employers or workers for collective bargaining purposes.

"As our unions have grown in membership and power, some of them have tipped the scales with more bargaining strength than the employers. This tends to make the unions headstrong, conciliation and mutual agreement more difficult. The collective bargaining policy, however, is predicated on equal bargaining power. *Many proposed amendments would weaken unions as a means of equalization. This would be a backward step.* It would lessen responsibility, and stimulate warfare rather than industrial law making. *The constructive way is to encourage employers to organize to match the strength of the unions.*" (Emphasis supplied.)

Organizing to "match the strength of the unions" certainly includes organizing to lock out in support of a struck member of the group.

A year later Dr. George W. Taylor, who, at various times has served his country, as chairman of the National War Labor Board, Secretary to the President's Labor-Management Conference, and Chairman of the Advisory Board of the Office of War Mobilization and Reconversion, delivered a paper at the University of California Institute entitled, "Can Wages Be Left to Collective Bargaining?", in which he declared:

> "The government was called upon, in 1935 and again in 1947, to adjust the economic power possessed by management and by organized labor so that *'an equality of bargaining power'* would obtain — so that neither would be able arbitrarily to impose its will on the other."

In discussing multi-employer bargaining he said:

> "There are other types of situations in which management derives advantages from multi-employer bargaining for a fair wage per se. In times of active business and shortage of manpower, disorderly upward spirals of wages can be minimized and labor turnover can be decreased.
>
> "Only through multi-employer bargaining, moreover, can whipsawing of small and medium-sized concerns, by the union be forestalled. *Setting a fair wage per se by group bargaining sometimes provides the only means by which a relatively small employer can secure any voice at all in wage determination, especially if he deals with a union powerful enough unilaterally to impose a multi-employer wage policy.*
>
> *"There are arguments for and against multi-employer bargaining. Acceptance of the 'anti'*

arguments, however, requires a conclusion that wages cannot be stabilized through collective bargaining despite the obvious need for just that kind of wage determination which was most apparent in the early 1930's." (Emphasis supplied.)

Without the right to lock out in support of a struck employer there *is no way* to forestall the whipsawing of small and medium sized concerns. The lockout is the only way for the small employer to secure any voice in the wage determination.

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6. WHILE IT IS TRUE THAT CONGRESS DID NOT SPECIFICALLY ENDORSE MULTI-EMPLOYER BARGAINING, IT DID NEVERTHELESS INTEND TO RECOGNIZE AND PRESERVE MULTI-EMPLOYER BARGAINING AS IT WAS THEN BEING PRACTICED BY REFUSING TO AMEND THE STATUTE IN WAYS WHICH WOULD WEAKEN MULTI-EMPLOYER BARGAINING AND WHICH WOULD REMOVE THE PROTECTION OF THE LAW FROM A MULTI-EMPLOYER BARGAINING UNIT.

Referring to the question whether or not Congress expressly sanctioned multiple-employer bargaining, the court below in a footnote in its opinion makes a brief reference to the legislative history of the attempt to outlaw multi-employer bargaining but concludes that multi-employer bargaining has never received the express sanction of Congress.

An examination of the legislative history referred to by the court reveals that the bill as originally enacted by the House absolutely prohibited multi-employer bargaining. This measure was abandoned as it had no prospect of success. In its place a sub-

stitute measure was offered on the floor of the Senate which did two things:

First, it provided that a labor organization could not be certified as the representative of two or more employers unless the employees were all located in the "same metropolitan area" and did not exceed one hundred in number.

Secondly, it restrained national or international labor organizations from dominating or interfering with the independence or autonomy of their local unions. (See footnote 13 opinion below.)

Despite the repeated protestations of the sponsors of this measure that if enacted it would not interfere with multi-employer bargaining as it was *voluntarily* carried on by employers and labor organizations, the measure was defeated.

One of the prime considerations in defeating this measure was that it *removed the protection of a Board certification from the multi-employer unit.* Again and again the various legislators expressed reluctance to *disturb the existing situation.* For example, Senator Lodge declared in part as follows:

> "I want to correct the evils that have developed and I want to help the small rural communities, *but I do not see why, in order to correct the evils that haven arisen and in order to help the small rural communities, we have to undo whatever good has been done by the uniformity in wage making and why we have to interfere with the non-rural communities where the general interest has been served by people being able to get together on wage matters.* It seems to me that the

job of statesmanship is to correct one evil without causing another evil." (Emphasis supplied.)

Senator Revercomb stated it succinctly: "Why *disturb a situation which is so satisfactory?*" (Legislative History pp. 1221 and 1222.)

The deliberate act of Congress in refusing to place multi-employer bargaining on an "extra legal" status by removing the protection of a Board certification and in refusing to enact even the relatively mild limitations which were proposed most certainly indicated that Congress intended that multi-employer bargaining should continue as it had been practiced.

CONCLUSION.

The National Labor Relations Board in its considered judgment concluded that the strike against one member of the multi-employer bargaining group "necessarily carried with it the implicit threat of future strike action against any or all of the other members of the multi-employer bargaining unit." This conclusion was accepted by the majority as well as the dissenting member of the court below.

Under the circumstances of the above case the Board in its considered judgment concluded that the action of the members of the multi-employer bargaining group in locking out in support of a struck member was not an unlawful interference with protected concerted activities. With reference to the undertaking of the court below to reverse this decision of the

Board we can do no better than to quote from the language of this court in *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177 at 194, as follows:

> "* * * But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric *process of administration.*" * * * (Emphasis supplied.)

As was said in the dissenting opinion below:

> "The Act is not a detailed blueprint but a general guide; and it is the function of the Board to adjust the conflicting interests of employers and employees. * * *
>
> "* * * I do not think it is properly inferable that Congress by its inaction meant to leave the question of multi-employer bargaining to be dealt with in future legislation. On the contrary, considering the long history of multi-employer units it seems more reasonable that Congress intended that the Board should continue its established administrative practice of certifying multi-employer units and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future."

There being no express statutory prohibition against lockouts by employers in support of a struck member of their bargaining group under the circumstances of

this case nor anything in the legislative history to indicate such intent on the part of Congress, it was error for the court below to reverse the decision of the Board.

Dated, San Francisco, California,
November 14, 1956.

Respectfully submitted,

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California Metal Trades Association,
California Processors and Growers, Inc.,
Central California Chapter, The Associated General Contractors of America, Inc.,
Distributors Association of Northern California,
Employers Council of Santa Clara Valley,
Federated Employers of San Francisco,
Pacific Maritime Association,
Retail Furniture Council of San Francisco,
Sacramento Valley Associated Industries,
San Francisco Employers Council,
San Francisco Retailers Council,
San Joaquin County Industrial Association,
United Employers Incorporated,
Amici Curiae.

(Appendix Follows.)

Legislative History of LMRA 1949—pp. 468 & 469
Senate Minority Report No. 105, Pt. 2 on S. 1126

"We should like to indicate what would be the effect of a ban on industry-wide bargaining on present-day industrial relations.

"Any attempt to ban actions by employers to form voluntary associations for the purpose of collective bargaining would deny this group the protection accorded employee organizations. In many trades and industries, employers have joined together to bargain with unions representing their employees. In such industries as longshoring and building construction—where workers change employers from day to day or week to week—bargaining through employers' associations is the only practical method for establishing uniform wages and working conditions and eliminating cutthroat competition. Almon E. Roth, President of the National Federation of American Shipping, in a statement before the committee, warned that a ban against industry-wide bargaining would result in a 'diversity of wage rates and working conditions among ships operated from the same coast, plying between the same ports, tying at the same docks, and employing, in turn, the same men:

'Such a condition leads to the playing off of one steamship company against another by the unions, to extreme labor unrest, and eventually to the disruption of steamship operation.'

"Many employers prefer industry-wide or association bargaining. Mr. Vincent P. Ahearn, executive secretary of the National Sand and Gravel Association, testified before the committee:

"'Some employers believe that if they could not bargain on an industry-wide basis, unions could simply isolate one employer after another and force capitulation to their demands.'

"This would create a situation where the weakest member of an industry would set the standard for the others.

"Because numerous employers are covered by a single collective-bargaining agreement, less time is lost in the bargaining process. Settlements are made simultaneously for these employers rather than on an individual employer-by-employer basis. Industrial peace is achieved in one step, rather than over a prolonged period of time. Bargaining with hundreds of individual firms for the same things is both wasteful and unfair to both sides.

"Many small employers lack the skill in bargaining and research facilities available to unions. A ban on associations of employees combining for the purpose of pooling their knowledge and resources in collective-bargaining negotiations would impair the bargaining power of employers.

"Industry-wide agreement on wages protects wage standards from being undercut by lower-wage areas and lower-wage employers. By the same token, industry-wide bargaining may save individual employ-

ers from being singled out as wage leaders in their respective industries. A ban on such agreements would result in separate agreements with individual locals. Many firms control or own subsidiary plants in districts outside an immediate geographic area. Such firms would have to negotiate agreements with numerous local unions in widely scattered localities—a task that would unavoidably become snarled up in wage differentials and eventually would revive the old cutthroat competition and the law of the jungle between company and company, between area and area."

Legislative History of LMRA 1947—pp. 971 & 2
Congressional Record, Senate—March 10, 1947

"1904

"Mr. Morse. Mr. President, as the debate on Senate bill 133 progresses I think that later in this session we shall want to refer repeatedly to the information contained in this excellent bulletin on Collective Bargaining With Associations and Groups of Employers, because I think it is clear from the data presented in the bulletin that passage of Senate bill 133 would be disruptive of the labor relations in a large number of industries, involving a great many thousands of employees.

"The testimony that was presented to us by some employer representatives at our committee hearings, Mr. President, shows that there are many employers who are completely sold on the desirability of group-employer collective bargaining with labor insofar as the particular problems of their industry are con-

cerned. Take, for example, the maritime industry, with which I have had some years of experience as the Pacific-coast arbitrator. I am satisfied that the formation of the West Coast Ship Owners Association for collective-bargaining problems brought remarkable labor-relations stability to the industry during

"1905

the years when I was arbitrator. I do not mean we did not have a great deal of trouble, for we did; but I do mean that the *united actions of the shipowners* in the great cases that we tried were a great boon to them. Prior to the formation of their employers' association the union strategy—and it is not a bad one as far as effectiveness is concerned—was to pick off shipowners one at a time, starting with the ones the union felt were in the weakest bargaining position. However, after the association was formed the officers of that association, principally through Mr. Frank Foisie, the president, and Mr. Gregory Harrison, its general counsel, were in a position to represent and speak for all the shipowners on the west coast."

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In The

Supreme Court of the United States

October Term, 1956

No. 103

National Labor Relations Board,
Petitioner

v.

Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.

BRIEF FOR THE UNION EMPLOYERS SECTION, PRINTING INDUSTRY OF AMERICA, INC., AS AMICUS CURIAE

The Union Employers Section, Printing Industry of America, Inc., submits this brief *amicus curiae* to the Court in the genuine belief that it will aid the Court in the resolution of some of the questions presented by this case. The parties have consented to the filing of this brief in accordance with Rule 42(2).

STATEMENT OF THE CASE

This case is before the Court on writ of certiorari to the Court of Appeals for the Second Circuit. The decision which this Court is to review set aside an order of the National Labor Relations Board (referred to herein as the "Board") dismissing a complaint alleging that certain employers belonging to a multiple bargaining association, the Linen Credit Exchange of Buffalo, New York (herein

referred to as the "Association") violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (herein referred to as the "Act").

The case was tried before the Board on a stipulated set of facts (R. 16, 21-22).[1] Briefly summarized, the stipulation showed that for some thirteen years the employers against whom the complaint had issued had been members of the Association. During this period Truck Drivers Local No. 449, the charging party before the Board and Petitioner in the court below, had been the bargaining representative of the truckers employed by the members of the Association. It had been the practice of the Association to negotiate successive collective bargaining contracts with the Union covering wages, hours and other terms and conditions of employment with respect to the truck drivers.

Sixty days before the expiration of the 1952-53 agreement the Union served a written notice of a desire to negotiate a new contract. Bargaining conferences began shortly thereafter but the parties were unable to reach agreement by April 30, 1953, when the old contract expired. Negotiations continued, however, during the following month until on May 26, 1953, the Union local struck Frontier Linen Supply Company, one of the members of the employer association (R. 18). The other employers then locked out their employees, but the Association notified the Union that if it would terminate the strike at Frontier, the other companies would recall the locked out workers.

About a week later, as a result of further conferences between the Association and the Union, agreement for a new contract was reached. The Union then called off the strike against Frontier and the other companies immediately reopened, reemploying the drivers who had been laid off during the strike.

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[1] The letter "R" followed by a number refers to the page in the "Transcript of Record" printed for this Court after the writ of certiorari had been granted.

In dismissing the complaint the Board found that it was reasonable to infer that the strike against one employer carried with it an implicit threat of future strike action against the other members of the Association. Accordingly the Board concluded that the object of the strike was to destroy the solidarity of the Association by causing successive and individual employer capitulations to the Union's demands. Finding no independent evidence of anti-union motivation, the Board declared that the action of the employers in discontinuing operations until the strike at Frontier was ended, was privileged (R. 36).

On petition for review to the Court of Appeals for the Second Circuit a majority of the Court in an opinion written by Judge Frank disagreed (R. 42, 61), declaring that the lockout was illegal interference with the right of employees to engage in concerted activity and also constituted discrimination against the non-striking employees for the purpose of discouraging union membership. Hence the Court held that the Board should have found a violation of both Section 8(a)(1) and 8(a)(3) of the Act.

THE INTEREST OF THE AMICUS CURIAE

The Amicus, Printing Industry of America, Inc., with offices in Washington, D. C., is the principal national trade association for employing printers in the United States. The industry embraces all commercial printing, including book and job printing, with the exception of daily newspapers, which own and operate their own mechanical departments. According to the 1947 Census of Manufacturers the commercial printing industry is one of the major industries in the United States, employing 437,668 employees in 19,430 establishments and producing $4,400,000,000 worth of products annually.

The bulk of this industry is unionized. In the cities where there are numerous printing establishments, collective bar-

gaining with the various printing trades unions is conducted by associations of employing printers. Generally speaking, the major international unions in the printing field, e.g., the International Printing Pressmen and Assistants Union, AFL; the Amalgamated Lithographers Union, CIO; the International Typographical Union, AFL; the International Brotherhood of Bookbinders, AFL; and the International Electrotypers and Stereotypers Union, AFL, usually have but one local for any given city. This local admits to membership all the particular craftsmen in that area within the "jurisdiction" of the international union.

The practice of the international unions in organizing their locals on a multiple employer basis in the various printing centers developed more than 100 years ago. These unions then would meet and adopt a "scale of prices" which were presented to the individual shops for acceptance. It was not until the latter part of the 19th Century that in the large printing centers, like Philadelphia, New York and Chicago, employers associated together into community groups to confer and make contracts with the printing trades. Even then employers were slow to organize themselves on the same basis as the unions.[2] While this evolution has been gradual, the Union Employers Section, the division of the national trade association to which most of the companies which have union contracts belong, includes within its membership, approximately 60 local associations which negotiate collective bargaining agreements on a city-wide or metropolitan area basis with the different locals.

This system of bargaining developed many years before the enactment of the National Labor Relations Act. Consequently, as this relationship had already been established, very few printing employer associations or printing trades unions have been the subject of unit findings, elections or certifications under Section 9 of the Act. Nevertheless, the

[2] See H. A. Millis, *How Collective Bargaining Works*, pp. 126-129, 20th Century Fund, 1942.

Board has recognized that the employees of the various companies belonging to local employing printer associations constitute a single unit appropriate for collective bargaining, e.g., *International Typographical Union and Graphic Arts League*, 87 NLRB 1215, and *International Typographical Union and Union Employers Section of Printing Industry of America, Inc., on behalf of New York Employing Printers Association, Inc., (Printers League Section); Franklin Association of Chicago; Graphic Arts Association of Michigan, Inc., (Typographical Union Employers' Section); Graphic Arts Association of Michigan, Inc., (Rotary Newspaper Employers Division), and Printing Industry of Pittsburgh, Inc., (Union Employing Printers' Section); Master Printers Association of Newark and Vicinity (Union Shop Committee) and Men and Management Conference of St. Louis, Graphic Arts Industries (Employers' Division)*, 87 NLRB 1418; 190 F(2) 45 (C.A. 7, 1951).

The inability of individual employers in this industry to match the collective economic strength of the unions is due very largely to the small size of the typical printing establishment. While the industry does include some big integrated plants with as many as two or three thousand employees housed in a modern building designed for the production of magazines, mail order catalogues, telephone directories and popular books, such establishments are exceptional. The typical printing employer occupies a small section of a loft building in which a few linotype machines, a binding machine and perhaps a bedrock press are situated. A large segment of the industry consists of what are called trade composition houses, small employers who operate only a composing room and sell type in galley form to larger establishments. About 88% of the companies engaged in commercial printing employ only 20 wage earners or less.[3]

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[3] U. S. Census of Manufacturers, "*Wage Earners and Wages in Establishments Classified According to Number of Wage Earners*," 1947.

Unless these small companies are to be completely at the mercy of the well organized and highly disciplined craft unions, which in many cities have virtually a monopoly of the labor supply, they must depend upon associating themselves with other employers to maintain a united front. Obviously, such a united front cannot be maintained if our national labor policy, as embodied in the Taft-Hartley Act, prevents employers from bargaining with individual employees who desire a union to represent them and yet permits unions to single out individual employer members of a bargaining association and compel them to yield one by one to the union's demands. As we do not think that the Taft-Hartley Act intended any such paradoxical result, we believe the court below construed the Act erroneously.

ARGUMENT

I. *The Court Below Was In Error In Its Premise That A Lockout By An Individual Employer Is An Unfair Labor Practice.*

We fully agree with the Solicitor General that unless the members of a multiple-employer bargaining association, constituting a single bargaining unit, may lawfully suspend operations when a union representing their employees strikes a fraction of the membership, the equality of bargaining power which the Act was intended to protect has been destroyed. As the briefs of the Government and the other amici lucidly depict the catastrophic effect upon multiple-employer bargaining if the decision of the court below is permitted to stand, we shall not elaborate upon this point.

Wholly apart from the question of the rights of employers deriving from association bargaining units, however, it is our position that the Court of Appeals erred in its fundamental premise, viz., that a lockout by an individual employer is illegal *per se* if intended to exact pressure on

a union to agree on contract terms. From this premise, the court argued that the rights of individual employers were not enlarged by membership in an association bargaining group and hence the Board was wrong in holding that the multiple-employer lockout in this case was lawful.

We think it plain that neither before nor after the Taft-Hartley amendments of 1947 was the National Labor Relations Act ever intended to prohibit lockouts—absent an intent to avoid collective bargaining, to destroy a labor organization by discriminating against union employees, or to deprive employees of their right to select their own representatives and engage in concerted activity. This record makes it clear that the lockout in this case was not motivated by any such objectives. Accordingly, if the Court agrees with our contention it is unnecessary to pass upon the association unit issue.

A. *The Opinion Contains a Misstatement of Law and Fact.*

The premise of the court below to which we refer was stated by Judge Frank in his opinion as follows:

> "'The Board, in its brief, concedes, as it must, the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice. Up to the time of the decision in the instant case, the Board has held that only in unusual cases of economic hardship is an employer justified in locking out its employees when faced with a threatened strike.'"[4] (R. 45).

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[4] The court illustrated what it meant by "economic hardship" by citing cases where employers had shut down to avoid spoilage of materials or because of production or service problems which confronted them as a result of intermittent or threatened stoppages. Apparently in these cases there was no element of the shut down being intended to enable the employer to secure better contract terms. Thus, these cases, viz., *Duluth Bottling*, 48 NLRB 1335; *International Shoe*, 93 NLRB 107; and *Betts-Cadillac*, 96 NLRB 268, were decided on the ground that there was no lockout in the ordinary sense of that term. In other words, Judge Frank is saying in effect that lockouts are never justified, for the situa-

We respectfully submit that despite the concession to which the court refers (or perhaps because of it) both these propositions are incorrect. In our opinion, it has never been an accepted legal principle that a lockout to counter an anticipated or threatened strike amounts to an unfair labor practice. The purpose of the lockout is what determines its legality. Moreover, contrary to Judge Frank's assertion, the Board in its early history (as we shall demonstrate) consistently held that lockouts undertaken for the purpose of obtaining better contract terms from a union were lawful. It was not until 1950 when the Board handed down its decision in the *Morand Brothers* case, 91 NLRB 409, that the Board had ever held that a lockout was illegal, *per se*.

B. *The Court's Opinion Disregards Familiar Rules of Statutory Construction.*

Paradoxically, this holding by a divided Board[5] was made three years after the passage of the Taft-Hartley Act which contains certain provisions which should have set to rest whatever doubt might previously have existed as to the lawfulness of the lockout as a technique in bona fide collective bargaining. We contend that the *Morand* doctrine was formulated by the Board in disregard of the clear implications of these provisions and that the court below fell into the same error of statutory construction in adopting a Board position which that agency itself now seems to have abandoned.

One of these provisions is Section 8(d) of the present Act which requires parties to give 60 days notice in order to terminate collective bargaining agreements effectively.

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[5] Member Reynolds dissented in the first *Morand* case, 91 NLRB 409, and Chairman Herzog in the second, 99 NLRB 1448, to the proposition that a temporary lockout for purely economic purposes was illegal.

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tions which he deems permissible were not lockouts at all. See "Restatement of Torts, Sec. 788 Comment subdiv. (a)":

> "A lockout is an employer's withholding of work from his employees in order to gain a concession from them. It is the employer's counterpart of a strike."

During the period this notice is in effect, this subsection makes it the duty of both parties to continue—

> "in full force and effect, *without resorting to strike or lockout*, all the terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration of such contract, whichever occurs later." [Emphasis supplied.][*]

It is apparent from the foregoing language that by fixing a period during which strikes and lockouts would be prohibited, Congress assumed that such activity was permissible in the absence of such a prohibition, and therefore did not mean to prohibit either strikes or lockouts generally. If lockouts were already illegal *per se*—the underlying premise of the court below—there would have been no point in forbidding resort to such action merely during the 60 day notice period, for an employer engaging in such conduct whether or not he waited for the 60 days to run would have been committing an unfair labor practice.

Moreover, the accompanying reports reveal recognition by the committees in charge of the legislation of the legality of lockouts. See the Report of the House Conference Managers, H. Rept. No. 510, 80th Cong., 1st Sess., p. 35; H. Rept. No. 245, pp. 21, 22; and pp. 70-82; and the Report of the Senate Labor Committee, S. Rept. No. 105, p. 24. A colloquy on the floor between two members of the Senate Labor Committee, Messrs. Ball and Morse, also shows that this same understanding was shared by Senators on opposing sides in the debate. 93 Cong. Rec. 1893, 1894.

There is other intrinsic evidence in the text of the Act which also establishes this proposition. Thus, in Title II dealing with the duties of the Director of the Federal Mediation and Conciliation Service, it is provided (Sec. 203(c)) that the Director will seek to induce the parties to settle

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[*] The stipulated facts in this case reveal that both parties complied with the 60 day waiting period (R. 18).

their dispute "without resort to strike, *lockout* or other coercion". [Emphasis supplied.] Even more significant are the provisions in the same title dealing with national emergencies. Section 208(a) provides that upon receiving a report from a board of inquiry the President may direct the Attorney General to apply to the United States district courts "to enjoin such strike or *lockout* or the continuing thereof". Section 210 provides for the emergency injunctive orders being vacated after an 80-day period.

The conclusion is inescapable that once the order is vacated the lockout or strike may be resumed. Had lockouts been made illegal by the language of Section 8(a)(1) and 8(a)(3) of Title I, there would have been no occasion for giving the Attorney General authority to apply for injunctive relief against a lockout for an 80-day period. If a lockout were an unfair labor practice, *per se*, then whether it was local or national, it could have been enjoined for an indefinite period under the provisions of Section 10(j), Title I, which authorizes the Board to obtain injunctive relief against any unfair labor practice during the pendency of a complaint.

Section 8(d)(4) was the subsection upon which the Courts of Appeals for the Seventh and Ninth Circuits in *Morand Brothers Beverage Co.* v. *N.L.R.B.*, 190 F. 2d 576 at 582; *Leonard* v. *N.L.R.B.*, 197 F. 2d 435 at 439, respectively, relied, *inter alia*, in rejecting the Board's 1950 notion that a lockout intended solely as a means of causing a union to make contract concessions was unlawful. In brushing aside the obvious significance of this subsection, the court below after noting that no provision of the Act specifically prohibits or authorizes lockouts by employers (R-44), adopted the argument that the inclusion of the word "lockout" in the context of a provision forbidding both strikes and lockouts for a certain period stemmed from a Congressional desire "to emphasize even handed justice where union activity was being restricted" (R. 47).

The Court then quoted with approval, the Board's former theory that as Section 13 of the Act reserved the right to strike, the omission of any similar reservation respecting the right to lock out argued against any Congressional intent to establish that right (R. 47-8).

This reasoning does violence to basic canons of statutory construction. Section 13 (except for minor changes, not relevant here) was a part of the original Wagner bill, which was passed in 1935. It was apparently inserted to avoid any implication that labor's sole redress for such employer actions as were forbidden by the Act was to invoke the jurisdiction of the Board. But as the Wagner Act conferred no legal remedies upon employers, it was hardly necessary to state that management still possessed such methods of self-help as had not been proscribed. In fact, until the *Morand* case, the Board had never suggested that the language of Section 13 was necessary to preserve the right to strike on economic issues (i.e. issues unrelated to employer unfair labor practices).

It is true that the Taft-Hartley Act does not in express terms specifically authorize lockouts. One can also concede that the reference to lockouts in the 1947 statute does not reveal any Congressional intent to establish new rights for employers. What Section 8(d)(4) does is to render both strikes and lockouts unfair labor practices under certain circumstances, viz., failure to await the 60-day notice period. In other words, it purports to restrict the use of the lockout. Similarly, the other references to lockouts in Title II of the Act are also couched in terms of restricting lockouts rather than legalizing them.

But granted that a restriction does not create a right, it by no means follows that these restrictions were meaningless—a necessary conclusion if the lockout as a bargaining weapon was already an unfair labor practice as Judge Frank's opinion assumes. The real point is that the statutory language proscribing the lockout as a bargaining

weapon only under certain circumstances makes it difficult to escape the inference that under other circumstances Congress regarded the lockout as lawful. The attempt to avoid this inference by suggesting that the stated restriction on lockouts was a meaningless gesture intended only to make the statute appear two-sided would lead to absurd results. The only penalty which Section 8(d) imposes upon employers who lockout in disregard to the 60-day waiting period is to make such action an unfair labor practice. But if the court below is correct, all that Congress accomplished by its reference to employers in this subsection was to provide that employers who commit an unfair labor practice (i.e., a lockout) before the end of the 60-day period, are committing an unfair labor practice. In the actual administration of the Act, this would provide no deterrent for employers to postpone a lockout until the notice period expires, for the employer who waits before taking action would be equally guilty. Obviously, such an interpretation of the Act violates the familiar principle that courts should construe a statute so as to accord some meaning to every word or phrase.

C. *Legislative History Refutes the Theory that Lockouts Were Prohibited by the Wagner Act.*

Moreover, in order to agree with the theory that the 1947 restrictions on lockouts were unnecessary, one is forced to conclude that Congress either practiced deliberate fraud in order to make corresponding restrictions on strikes palatable to labor or was so ignorant of the legal setting in which it was framing amendments to the National Labor Relations Act that it was regulating a practice already completely outlawed. We do not believe, of course, that the court below drew the first inference. In view of its reference to prior Board decisions, however, it seems appropriate at this point to review briefly the relevant developments in Federal labor relations law prior to 1947, which we believe, removes any basis for the second inference.

Before the passage of the Wagner Act in 1935 the lockout was a technique not only used by employers opposed to any organization of their employees but also by employers accustomed to dealing with unions, as a means of securing a collective contract on terms not too onerous to management.

The term "lockout" itself has been defined by the courts as "a cessation of the furnishing of work to the employees in an effort to get the employer more desirable terms. Neither strike nor lockout completely terminates, when this is the purpose, the relationship between the parties." *Iron Molders Union* v. *Allis-Chalmers*, 166 Fed. 45, 52 (C.A. 7). See also, *Jeffrey-Dewitt Insulator Co.* v. *N.L.R.B.*, 91 F. 2d 134, 137 (C.A. 4); *Magner* v. *Kinney*, 141 Neb. 122, 2 N.W. (2d) 689.

The same meaning is ascribed to the term by text and case book writers: Millis & Montgomery, *"Organized Labor"*, p. 554; Gregory & Katz, *"Labor Law"*, pp. 147-148.

In their work entitled *"Organized Labor"*, Professors Millis[7] and Montgomery state (p. 554):

> "In exerting pressure upon employers to recognize them and accept their demands, unions . . . resort to the strike . . . The employers resort to corresponding methods—*the lockout* . . .
>
> "The strike has been and is organized labor's great weapon when differences are not settled by conciliation, mediation, or arbitration. From its use or threatened use the union obtains most of its power on the industrial field. *Its counterpart on the employer's side, and matching it fairly accurately, is the lockout.*" (Emphasis supplied.)

If the Wagner Act had contemplated so far-reaching a change in ordinary industrial warfare as the elimination of the lockout, it is strange that the sponsors of the Act made no reference to lockouts in the draft of their bill and

[7] Professor Millis was Chairman of the Board from 1940 to 1945, and had been a member of the predecessor Board, 1934-1935.

no explanation on the floor of Congress that this was one of the purposes of the legislation. Its legislative history, however, indicates that the Act was not intended to prohibit either strikes or lockouts as such. In explaining the bill to the Senate, Senator Walsh, Chairman of the Senate Committee on Education and Labor, said:

> "Mr. President, there are some fundamental rights an employer has, just as there are rights an employee has. No one can compel an employer to keep his factory open. No one can compel an employer to pay any particular wage. No one can compel an employer to hire others in addition to those he sees fit to hire. So with an employee, no one can compel him to work, no one can compel him to go on strike, no one can compel him to leave his work.
>
> "No one can keep an employer from closing down his factory and putting thousands of men and women on the street. So in dealing with this bill we have to recognize those fundamental things, and we have not gone into that domain. All we do is to remove the barriers that have kept employees away from their employers, which have prevented collective bargaining, which have resulted in strikes without any attempt to negotiate. All we have done is to promote the orderly processes of collective bargaining." (79 Cong. Rec. 7673.)

I. *The Board recognized that some lockouts were lawful.*

The Board created by the Act, however, soon recognized that the lockout was occasionally used as a weapon by some employers for halting incipient unionization and avoiding collective bargaining and holding—in our opinion quite correctly—that in such situations the lockout was a violation of Section 8(a)(1) and 8(a)(3). Thus, as early as 1938 when a case came before it dealing with the shut down of a plant for two days after a newly organized union had presented a petition for a wage increase, and opened

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only after the company had created an employee representation plan as a substitute for the union, the Board held this to be a violation of Section 8(a)(1) and 8(a)(3) and awarded back pay for the employees affected by the two-day lockout. *Ballston-Stillwater Knitting Co.*, 6 NLRB 470.

During the same year, however, another case came before the Board in which the same union had just organized a plant and threatened to strike unless the employer granted its wage demands. Before this threat could be made effective the employer locked out the employees. Throughout the lockout, as in this case, bargaining with the union continued, although ultimately no agreement was reached. The Board found that inasmuch as the company bargained during the period of the lockout, its purpose was not to discourage collective bargaining or membership in the union. Accordingly, the Board dismissed the complaint. *Lengel-Fencil Co.*, 8 NLRB 988.

During the next three years the Board continued to distinguish between permissible and illegal lockouts, applying the *Lengel-Fencil* doctrine whenever it appeared that the locking out employer was engaged in bona fide collective bargaining and not attempting to undermine the representatives selected by the employees. *Hobbs, Wall & Co.*, 30 NLRB 1027 (1941); *Brown McLaren Mfg. Co.*, 34 NLRB 984 (1941); *Joseph Levy, et al.*, 24 NLRB 786 (1940). To our knowledge none of these cases has been overruled and the failure of the parties to cite them to Judge Frank was apparently the basis of his erroneous statement that "up to the time of the decision in the instant case, the Board has held that only in unusual cases of economic hardship is an employer justified in locking out . . . when faced with a threatened strike" (R. 45).[8]

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[8] In formulating its 1950 theory, *Morand Brothers Beverage Co.*, 91 NLRB 409, that a lockout intended to minimize the effectiveness of a threatened strike is illegal, the Board seems to rely primarily upon a dictum in *Duluth Bottling Association*, 48 NLRB 1335. The *holding*

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National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. 151, *et seq.*:

Section 2 (1) 11
Section 2 (2) 11
Section 7 ..... 7, 9, 10
Section 8 (a) (1) 5, 10
Section 8 (a) (3) 5
Section 8 (b) (1) (B) 11
Section 8 (b) (3) 9

MISCELLANEOUS:

Feinsinger, Nathan P., "Collective Bargaining in the Trucking Industry," Univ. of Pa. Press, 1949, ... 2, 4

Gillingham, J. B., "The Teamsters Union on the West Coast," Univ. of Calif., 1956. (Institute of Industrial Relations Monograph No. 9) 3

Lahne, Herbert J., "The Intermediate Union Body in Collective Bargaining," (Industrial and Labor Relations Review, v. 6, no. 2, Jan. 1953, "The Teamsters," pp. 172-174) 4

U. S. Dept. of Labor, Bureau of Labor Statistics, "Analysis of Work Stoppages 1955." (Bulletin No. 1196) 4

2. *This view was shared by President and Congress during War period, 1941-1946.*

(a) *The establishment of the War Labor Board*

On December 17, 1941, shortly after the United States entered the Second World War, President Roosevelt arranged a conference of representatives of labor and industry to work out an agreement providing that for the duration of the war, all labor disputes should be settled without work stoppages (9 LRRM, 945). One of the proposals of the employer conferees was—"There shall be no strikes, lockouts, or work stoppages of any kind for the duration of the war." (9 LRRM, 947).

A similar suggestion, worded in almost identical language, was included in the proposals of the union conferees, namely:

> "It shall be accepted policy on the part of management and organized labor that there shall be no stoppages of work or lock outs during the present War." (9 LRRM, 949).

It was obviously the understanding of the conferees that lockouts were not generally prohibited by the National Labor Relations Act. The labor conferees also proposed that the National War Labor Board should not "attempt to adust a controversy when there is by agreement *of Federal law* a means of settlement," and that "the labor policies as established in the National Labor Relations Act shall continue unimpaired." (9 LRRM, 949).

The same understanding of existing law was apparently shared by President Roosevelt, for the text of the Execu-

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in that case, however, was that the lockout involved therein was not illegal and the Board did not profess to disagree with the trial examiner who had recommended dismissal on the authority of the *Lengel-Fencil* opinion and the other cases cited. As one of the allegations in the *Duluth* case was that one of the purposes of the lockout was to induce the employees to change bargaining representatives, the dictum was probably directed at lockouts of that type had the facts justified the allegation.

tive Order creating the new board contained a preamble reading as follows:

> "Whereas, as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes *or lockouts*, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adustment of such disputes:" (9 LRRM, 945). [Emphasis supplied].

(b) *The War Labor Disputes Act*

During the War period, Congress also assumed that lockouts, like strikes, were not outlawed by statute.

Thus in 1943, prior to any amendment of the Wagner Act, Congress passed the War Labor Disputes Act (Act of June 25, 1943; 57 Stat. 163).

It is plain from the language of Section 6 of this Act that Congress assumed that in the absence of new legislation, lockouts, as well as strikes, were legal, for it gave the President authority to deal with such interruptions of war production by seizing any plant, mine, or other facility where work stoppages existed. Section 3, which gave the President this power, contained a proviso reading as follows:

> "*Provided*, That whenever any such plant, mine, or facility has been or is hereafter so taken by reason of a strike, *lock-out*, threatened strike, *threatened lock-out*, work stoppage, or other cause, such plant, mine, or facility shall be returned to the owners thereof as soon as practicable . . ." (Emphasis supplied.)

Section 6 of the Act, designed to prevent interference with Government operations in plants, read in part as follows:

> "Sec. 6. (a) Whenever any plant, mine, or facility is in the possession of the United States, it

shall be unlawful for any person (1) to coerce, instigate, induce, conspire with, or encourage any person, to interfere, by *lock-out*, strike, slow-down, or other interruption, with the operation of such plant, mine, or facility, or (2) to aid any such *lock-out*, strike, slow-down, or other interruption interfering with the operation of such plant, mine, or facility by giving direction or guidance in the conduct of such interruption, or by providing funds for the conduct or direction thereof or for the payment of strike, unemployment, or other benefits to those participating therein . . ." (Emphasis supplied.) (12 LRRM, 2204).

(c) *The Truman Program*

When the cessation of hostilities was followed by numerous labor disputes which threatened an orderly return to a peacetime economy, President Truman on December 4, 1945, proposed that Congress enact legislation known as the "Labor Fact-Finding Board Act." He recommended that the legislation contain authority for the Secretary of Labor to certify to the President the existence of disputes seriously affecting the national interest, and the establishment of a thirty-day waiting period during which a fact-finding Board, created by the President, could conduct an investigation and make recommendations. Identical bills embodying the Administration's recommendations were introduced the next day in both houses of Congress.[9]

The text of Section 4 of those bills reveals that neither the President nor the draftsmen thought that either lockouts or strikes could be enjoined under existing law for even so limited a period as thirty days:

"Sec. 4 (a) During the period of five days following the date on which the Secretary of Labor makes a certification to the President under section 2 with respect to a labor dispute, and, if a board

[9] H.R. 4908 (Norton), and S. 1661 (Ellender), 79th Cong., First Session.

is appointed under section 3 to make an investigation concerning such dispute, during the period beginning when such board is appointed and ending five days after the date on which it submits its report—

(2) it shall be unlawful for any person to coerce, instigate, induce, conspire with, or encourage any person to interfere with or prevent such work or operations by *lock-out*, strike, or otherwise, or to aid any such *lock-out* or strike or other means of interfering with or preventing such work or operations by giving direction or guidance, or by providing funds for the conduct or direction thereof, or for the payment of strike or other benefits to those participating therein. . . .'' (Emphasis supplied).

(d) *The Case Bill*

When the Norton bill was reported to the floor by the Committee on Labor, the House adopted a bill in the nature of a substitute presented by Representative Case. On the Senate side, another substitute bill presented by Senators Taft, Ball and Smith, was adopted, and the House concurred in the Senate amendments. The enrolled bill, popularly known as the Case Bill, was then vetoed by the President, and the veto was sustained in the House.

The episode is significant, however, as showing that in the very year prior to the enactment of the Taft-Hartley Act, both the House and Congress passed legislation which discloses the premise that employers were still free to engage in lock-outs in the absence of statute. Hence the bill, in establishing a Federal Mediation Board, made it an unfair labor practice for employers to lock-out during the sixty-day period the Federal Mediation Board had the dispute under consideration. It also deprived employees of the protection of the National Labor Relations Act if they engaged in a strike during this sixty-day period. These provisions were contained in Section 3(b) of the Act.

"(b) Whenever the Federal Mediation Board proffers its services for the purpose of aiding in a settlement of a labor dispute affecting commerce and until the Board certifies that its efforts at mediation are concluded or until sixty days have elapsed since the Board's proffer of services, whichever date occurs first, it shall be the duty—

(1) of the employer or employers involved to refrain from any *lock-out* and to restore and maintain the rates of pay, hours, and working conditions which existed immediately prior to the time the dispute arose, except that changes agreed upon in writing with the employees or their representatives may be made; and

(2) of the employees and their representatives to refrain from any strike.

(c) Any employer who fails to perform the duties imposed upon him by subsection (b) of this section shall be deemed to have engaged in an unfair labor practice within the meaning of section 8 of the National Labor Relations Act, and the National Labor Relations Board is hereby authorized to utilize such powers as are granted to it by such Act to prevent and restrain such unfair labor practices and to grant appropriate affirmative relief.

(d) Any employee who fails to perform the duties imposed on him by subsection (b) of this section shall lose his status as an employee of the employer engaged in the particular labor dispute in connection with which such employee's failure occurred for the purposes of sections 8, 9, and 10 of the National Labor Relations Act: Provided, That such loss of status for such employee shall terminate if and when he is reemployed by such employer." (Emphasis supplied).[10]

The foregoing account of developments in Federal labor law reflects an understanding on the part of two presidents, the Labor Board, and the Congress, over the period

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[10] Excerpt from enrolled bill, H.R. 4908, as amended, 79th Cong., Second Session, 1946.

from 1935 to 1946 that lock-outs as such did not violate the National Labor Relations Act. It was against this background that Congress passed the Taft-Hartley Act in 1947.

In the light of this page of legal history, it is submitted that the restrictions on the lock-out in the Taft-Hartley Act were anything but meaningless, and it was not until the Board's decision in the *Morand* case, *supra*, that any agency of Government ever entertained this notion.

II. *The Text of the Act Does Not Justify the Court's Conclusions.*

In urging that the fundamental premise of the Court below was wrong, we do not take the position that a lock-out is never a violation of the Act. We recognize that a lock-out, like a strike, may under some circumstances, amount to an unfair labor practice. Thus, lockouts to blacklist strikers, discourage employees from joining or remaining members of a union, to induce workers to join company-dominated unions, or to deal individually with their employer rather than through a bargaining agent, are undoubtedly violations of Sections 8(a)(1), 8(a)(3), 8(a)(2) and 8(a)(5) of the Act, respectively. Similarly, strikes to cause employers to hire only union foremen, to discharge all non-union employees, to force an employer to boycott a particular supplier, or to pay money for services not performed are violations of Sections 8(b)(1)(B), 8(b)(4)(A) and 8(b)(6), respectively.

But in the instant case there is no showing whatsoever that the employers sought to make their employees give up their membership in the union or to make individual contracts of employment with them. The case, therefore, is completely distinguishable from the cases cited in footnotes 2 and 3 of the Opinion (R. 45), where administrative findings had been made that the employer's motive was illegal.

In reaching the conclusion that a lock-out intended to minimize the effectiveness of a strike was illegal *per se*, Judge Frank in his opinion relied strongly upon Section 7 of the Act, which guarantees to employees "the *right*" to engage in "concerted activities" and concluded that because a strike was concerted activity, such employer action as a lock-out constituted interference with this right, and was, therefore, a violation of Section 8(a)(1) of the Act. What the Court overlooked was the significance of the word "right." There are many cases which hold that although concerted activity may be lawful, an employer is permitted, without violating the law, to take appropriate steps to prevent the union from achieving the economic objectives of such activity. Thus in *National Labor Relations Board* v. *Mackay Radio Corp.*, 304 U. S. 333, it was held that even when the objectives of a strike are lawful, an employer may permanently replace economic strikers. Obviously any employer who does so, interferes to some extent with employees who exercise their right to engage in concerted activities. Indeed, it is difficult to conceive of a more severe or effective method of deterring them from continuing their strike. Yet it is not contended that such action by an employer would be a violation of Section 8(a)(1).

A fortiori, an employer who engages in a lockout in implementation of a "no contract, no work" policy in order to cause the union to yield to his terms and then rehires all the locked out employees after the settlement, as the employers did here, would clearly seem to be within his rights under the doctrine in the *Mackay* case.

As we have seen, the Board itself recognized this principle as applied to a lock-out in the early *Lengel-Fencil* case, 8 NLRB 988. Consequently, both the *Mackay (supra)* and *Lengel-Fencil* cases stand for the proposition that while employees have a right to engage in concerted activity, employers may check-mate the attainment of the economic goals of such activity, either by replacing the employees if

a strike has occurred, or by locking them out if a strike is imminent.

The language of Section 8(a)(3), upon which the Court below also relied, provides no support for its conclusions. If the decision of the Court below is correct, the record should show that the members of the Association "by discrimination in regard to . . . tenure of employment . . . discouraged [union] membership . . ."

The word "discrimination" in this context clearly implies disparity of treatment between union members and sympathizers on the one hand, and non-union or anti-union members on the other. There is not a scintilla of evidence in the record that any of the employers engaged in this kind of discrimination. They permitted none of their drivers, union or non-union, to continue at work, while the strike at Frontier was in progress. But immediately after the strike terminated, all the drivers were recalled and restored to their old jobs — again without discrimination. Accordingly, this record is devoid of any evidence—to say nothing of substantial evidence—which would have supported the Board in finding—as the court said it should—a violation of either Section 8(a)(1) or 8(a)(3).

CONCLUSION

In confining this brief to the single issue of the legality of the lockout, we do not mean to imply that we think the court below was correct in other particulars. We regard the parallel the court draws between the right of employers to withdraw from association units in advance of a collective bargaining commitment and the asserted right of the Respondent here to limit its bargaining, if it saw fit after an impasse, to a single member of the Association as a false analogy. Employer associations and unions derive their status as bargaining representatives under the Act as agents of employers and employees, respectively. Neither

agent is authorized to bargain for their respective constituents in a unit which is greater or less than the appropriate bargaining unit; and the appropriateness of the unit is reserved exclusively to the Board under Section 9(b) of the Act. Hence the argument advanced by other amici and the Government against any fragmentation of the established bargaining unit is another ground for reversing the holding of the court below.

The record also raises serious questions as to whether the union activity was not a clear violation of Section 8(b)(1)(B) and 8(b)(3). If this were the case, the union activity being illegal, the employees participating therein were not protected.

As both the issues concerning the bargaining unit and the legality of union conduct are covered in the briefs of the other amici, we did not develop them. If the Court agrees with us, however, on the basic principle that a lockout undertaken solely for the purpose of obtaining more advantageous terms in a collective bargaining agreement was never an unfair labor practice, *per se*, under the Act, we suggest that it is unnecessary for this Court to consider these more complex issues, for it could properly decide that on this ground alone, the decision of the court below should be set aside and the order of the Board affirmed.

Respectfully submitted,
UNION EMPLOYERS SECTION, PRINTING INDUSTRY OF AMERICA, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L.

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE

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November 30, 1956

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were disconsonant with the express purposes of the Act and sought, albeit on a temporary basis, to undermine the bargaining representative selected by the group, an end at variance with Congressional policies, its members thereby lost the protection which Section 7 secures.

In balancing the difficult factors of insuring to employees their traditional right to cease their work to impose legitimate demands on their employers by legal means against avoiding the burdening of commerce by work stoppages utilizing tactics Congress has condemned, we submit that the Board has properly determined the preponderant public interest by its decision here. The very fact that it originally reached an opposite conclusion but, when the improper consequences of that position were repeatedly noted by the Circuit Courts, re-evaluated the question and came to the conclusion it reached here, in the light of its greater study and experience, is significant.

To deny the Board the right to permit employers faced with this disruptive tactic to defend themselves by terminating their operations until it is abandoned, as the Court below has done, is to undo much of the progress towards industrial stability which has been secured by the labor contracts and negotiations attained through multi-employer bargaining, the propriety of which is treated in briefs of other *amici curiae*. This would conflict with the clear desire of Congress and with the interest of the public, as well as with that of the many associations who are members of American Trucking Associations, Inc.

CONCLUSION

We respectfully urge this Court to reverse the decision of the Court below and sustain the order of the National Labor Relations Board dismissing the complaint.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

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IN THE

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NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L.

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE[1]

OPINIONS BELOW

The opinion of the National Labor Relations Board, herein called the Board, dismissing the complaint, based on a charge filed by Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

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[1] This amicus curiae brief is filed with written consent of the parties.

A.F.L., herein called the Union, entered on July 26, 1954, is reported at 109 NLRB 447. The opinion of the United States Court of Appeals for the Second Circuit, setting aside the Board's order, is reported at 231 F. 2d 110.

JURISDICTION

The judgment of the court below was entered on March 13, 1956. The jurisdiction of this Court was invoked under Section 10(e) of the National Labor Relations Act, herein called the Act, and under 28 U.S.C. § 1254(1). The petition for certiorari was granted on October 8, 1956.

INTEREST OF AMERICAN TRUCKING ASSOCIATIONS, INC.[2]

The A.T.A. is a federation of affiliated associations of trucking employers throughout every state in the Union and the District of Columbia. Multi-employer bargaining "of every conceivable size, shape and character"[3] prevails in the trucking industry, which is almost completely organized, and its members bargain almost exclusively with various subordinate bodies of the International Brotherhood of Teamsters. There are over 75 trucking employer associations which bargain with unions representing their employees on a multi-employer basis. The large number of carriers concerned with the maintenance of stability, without

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[2] Pursuant to Rule 42(5) of the Rules of this Court, this brief amicus will set forth only the interest of American Trucking Associations, Inc., herein called A.T.A., the summary of argument, the argument, and the conclusion, and rely on the Government's brief for the other customary sections.

[3] Feinsinger, Nathan P., "Collective Bargaining in the Trucking Industry," Univ. of Pa. Press, 1949, p. iii.

work stoppages, during negotiations on such a multi-employer basis is dramatically attested to by the fact that among A.T.A. members are the Empire State Highway Transportation Association, Inc., with a membership of approximately 1500 carriers in the New York metropolitan area and California Trucking Association, Los Angeles, California, with approximately 800 members in California, Nevada, Arizona and El Paso, Texas. Among other motor carrier groups vitally interested are the Motor Carriers Council of St. Louis, St. Louis, Mo., with 100 carriers in the St. Louis area; Motor Transport Labor Relations, Inc., Philadelphia, Pa., with 300 carriers in the Philadelphia area; and Labor Relations Department, OTA, Columbus, Ohio, with 165 carriers in Ohio.

The dependence of the entire nation and its economy on the trucking industry is self-evident, since "labor relations in the trucking industry, like those in the railway and coal industries are a matter of direct concern to virtually every business in the country." (Feinsinger, *op. cit.*, p. iii). See also Gillingham, J. B. "The Teamsters Union on the West Coast." Univ. of Calif., 1956. (Institute of Industrial Relations Monograph No. 9).

The trucking industry, moreover, includes by far the largest carriers of agricultural products. Thus, the effect on interstate commerce of those obstructions which Congress sought to end, both by the original Act and its amendments, displays its most serious impact on the public in this industry, which has been subject to extensive regulation by both the Federal Government and the States.

The tendency is toward including a greater number of employers in an increasingly larger area into uni-

fied, multi-employer bargaining groups, bargaining with the Teamsters in one set of negotiations, at least as to major issues. As long ago as 1948, Dr. George W. Taylor, of the University of Pennsylvania, commented on this condition when he said:

> "Since the union has sought to apply the same kind of wage policy to all those who employ its members, and has had the economic power substantially to effectuate its policy in recent years, the operators have at least one very strong community of interest—their labor relationships. As employers became aware of this fact and became cognizant of their own individual lack of economic power, they began forming their own organizations for collective bargaining. To a large extent these organizations have tended to encompass those operators from whom the union has customarily sought identical terms of employment. One can even conclude that multi-employer bargaining in the trucking industry was inaugurated by employers the better to insure retention of their own collective bargaining rights." (Feinsinger, *op. cit.*, p. iv)

See also Lahne, Herbert J., "The Intermediate Union Body in Collective Bargaining" (Industrial and Labor Relations Review, v. 6, no. 2, Jan. 1953, "The Teamsters," pp. 172-174).

Attempts by the Teamsters to gain their objectives through selective strikes against a limited number of motor carrier employers included in larger employer groups in the trucking industry in 1955 resulted in 2 major stoppages, one a 44-day stoppage in Connecticut, Massachusetts, Rhode Island and other Eastern states, and the second a 24-day stoppage in 12 Western states.[4] The first involved 20,000 and the second 29,000 workers.

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[4] U. S. Dept. of Labor, Bur. of Labor Statistics, "Analysis of Work Stoppages 1955" (Bulletin No. 1196), pp. 4, 16, 17.

The significance to the A.T.A. of invalidating this tactic is self-evident.

STATEMENT

During the customary negotiations with the Linen and Credit Exchange, herein called the Exchange, for a new contract covering the employees of 8 of its members whose truck drivers were represented by the Union, the Union struck Frontier Linen Supply, Inc., herein called Frontier, with which it had no separate dispute. Rather than follow the tempting alternative of taking over Frontier's customers while their own employees, continuing to receive wages, supported their union's action against Frontier, the other members ceased operations, pending the termination of this strike. The Board refused to find that by doing so they had either interfered with or discouraged the legitimate concerted or union activities of their employees protected by the Act.

SUMMARY OF ARGUMENT

A.T.A. will confine its argument in this brief to its contentions that (1) the Board's conclusion was correct that the coercive device utilized here by the Union was not protected by the Act, and the cessation of activities by the employers other than Frontier was not, therefore, violative of either Section 8(a)(1) or 8(a)(3) of the Act; and (2) that assuming, *arguendo*, that the Union's strike activities were inevitably discouraged by the cessation of the operations of the other employers, the protective action of the other members of the Exchange was "for cause" within the meaning of Section 10(c) of the Act, and hence could not be the basis for a remedial order.

ARGUMENT

I. THE CONCERTED ACTIVITY PROTECTED BY THE ACT DOES NOT EMBODY ALL STRIKE ACTIVITY

The fundamental error of the Court below lies in its failure to recognize the limitations which this Court, throughout the years, has, in interpreting congressional intent, placed upon the rights of employees to engage in concerted action and to impose coercive pressures on employers in the course of negotiating labor agreements. Thus, this Court long ago cautioned the Board against interpreting the Act to protect employee concerted conduct for example, which involved the tortious seizure of the employer's property (*N. L. R. B.* v. *Fansteel Metallugical Corp.*, 306 U. S. 240 (1939)); which was at odds with the Union's contractual obligations (*N. L. R. B.* v. *The Sands Manufacturing Co.*, 306 U. S. 332 (1939)); or which was at variance with the mutiny statutes (*Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31 (1942)).

Here, the Union's tactic of threatening each member of the Exchange, without warning as to when or on which the weapon would next be used, with a separate strike designed to force each member to abandon the bargaining position assumed by its collective representative, was clearly beyond the protection the Act extends to employees engaging in legitimate concerted activity. The Court below failed to recognize that the device utilized by the Union was at variance with the activities which Congress sought to protect, both in the method used to secure its objective, and in the end it sought to achieve. There is a striking similarity between the tactic utilized here and the one held beyond the Act's protection by this Court in *Automobile Workers* v. *Wisconsin Board*, 336 U. S. 245, 256-257 (1949). There the Court pointed out that not

all concerted or even union activities of employees fall within the Act's protection, as the Board acknowledged in early decisions, when it held:

> ". . . Section 7 of the Act expressly guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. We do not interpret this to mean that it is unlawful for an employer to discharge an employee for *any* activity sanctioned by a union or otherwise in the nature of collective activity." (*Harnischfeger Corporation*, 9 NLRB 676, 686 (1938)). See also *Armour & Company*, 25 NLRB 989, 996 (1940).

In the *Automobile Workers* case, the Union instigated certain intermittent and unannounced work stoppages after a deadlock in contract negotiations with the employer, Briggs & Stratton Corporation, without any indication as to when the employees would return to work. In the strategy here involved, the surprise element lay in which employer in the unit would be struck next and when. What this Court said of that tactic is equally true of this: "To hold that the alleged fixed Board interpretation has irrevocably labelled all concerted activities 'protected' would be in the teeth of the Board's own language and would deny any effect to the Courts of Appeals' decisions", citing ". . . *C. G. Conn, Ltd.* v. *N.L.R.B.*, 108 F. 2d 390; *N.L.R.B.* v. *Condenser Corp.*, 128 F. 2d 67; *Home Beneficial Life Ins. Co.* v. *N.L.R.B.*, 159 F. 2d 280; and see *N.L.R.B.* v. *Draper Corp.*, 145 F. 2d 199; *N.L.R.B.* v. *Indiana Desk Co.*, 149 F. 2d 987" (p. 257).

Affirmatively stated, the strike activity which the Act sought to protect was the "traditional peaceful strike for higher wages." *Auto Workers* v. *O'Brien*, 339 U.S. 454, 459 (1950). Conversely, concerted ac-

tivity which is either designed to attain an illegal end or not "carried on in such a manner as to come within the protection of § 7" is beyond the protection of the Act. *N.L.R.B.* v. *Local No. 1229,* 346 U.S. 464 (1953).

II. BY THE STRIKE AT FRONTIER THE UNION UTILIZED AN IMPROPER METHOD TO ATTAIN ITS END

It is easily demonstrable that the strike at Frontier, in the course of negotiations with Exchange, the established representative of the group of employers, constituted, as the Court below did not dispute (R. 44), a potent threat to strike, without warning, one after another of the other members, so that each, shorn of the protection of the group and exposed to the normal competitive practices of its erstwhile associates, whose employees continued working, would be forced to capitulate. The coercive effects of such strike threats are clear, even where only economic pressures are involved.[5]

Regardless of the end sought, the Court below overlooked the fact that the means utilized here can scarcely be viewed as the "traditional peaceful strike for higher wages" which the Act seeks to protect. The arbitrary selection of one member of a multi-employer group, as an example of what might befall each, readily shows that the strike at Frontier was not a proper means of attaining a true collective bargaining objective. Such a tactic is plainly in the realm of those this Court has held beyond the protection of the Act.

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[5] Cf. *Bianchi* v. *U. S.*, 219 F. 2d 182 (C.A. 8) (1955), cert. den. 349 U.S. 915; *Callanan* v. *U. S.*, 223 F. 2d 171 (C.A. 8) (1955), cert. den. 350 U.S. 862. This device lends itself readily to coercion for illegal ends. Cf. *Masiello* v. *U. S.*, 235 F. 2d 279 (C.A. 2), cert. den., 77 S. Ct. 100 where, after an association had agreed to the terms of a contract, individual members were threatened with strikes to procure illegal tribute from the struck employer.

The unlimited protection which the majority below believes attaches to the right to strike (R. 44-45, 47-48) is not consistent with this Court's conclusion that Section 13 does not "make the strike an absolute right" so as to legalize all its variations and place them beyond the power of federal authorities to control or deprive management of the right to take reasonable steps to resist or combat the coercive tactics of the union. The Court below failed to consider that management, this Court has held, need not be disabled from every kind of self-help to cope with such tactics except to submit to the demands. *Automobile Workers* case at p. 264; *Allen-Bradley Local* v. *W.E.R.B.*, 315 U.S. 740, 750-751 (1942).

III. THE TACTIC USED BY THE UNION HAD AN ILLEGAL OBJECTIVE

The tactic to which the Union here resorted served primarily as a means of undermining the employers' designated representative in the established, acknowledged and contractual unit. This is not to say that a *bona fide* strike for a changed, or even an inappropriate, unit is necessarily unprotected. It is not contended that the Union had such an object in this case. The strike at Frontier, however, had the inevitable effect of destroying the status of the employers' representative, the Exchange. Unions, like employers, are obliged to bargain in good faith. Act, Sec. 8(b)(3). Attempts at direct dealing by employers with employees who have designated a bargaining representative have been held to be not only interference with employee rights under Section 7, but also to be a failure to meet the employer's obligation to bargain collectively with that selected representative in violation of Section 8(a)(5), by this Court, which has said:

"That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332; cf. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342; see also *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 359-361. The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by § 7 and a violation of § 8(1) of the Act."

(*Medo Photo Supply Corporation* v. *N.L.R.B.*, 321 U.S. 678, 684 (1944). See also *N.L.R.B.* v. *Highland Shoe, Inc.*, 119 F. 2d 218, 221 (C.A. 1) (1941). Nor does the Union's continued dealing with the Exchange, whose effectiveness it sought to undermine, offset the effect of its conduct. See *N.L.R.B.* v. *Acme Air Appliance Company, Inc.*, 117 F. 2d 417, 420-421 (C.A. 2) (1941).

While employers have no rights comparable to those guaranteed employees by Section 7, unions which represent a majority of their employees in an appropriate unit do have a parallel obligation to bargain collectively with the employer, and the standards for good faith bargaining recited in Section 8(d) are the same for both unions and employers. *National Mari-*

time Union of America, 78 NLRB 971, 980-981 (1948), enforced 175 F. 2d 686 (C.A. 2) (1949), cert. den., 338 U.S. 954. That the employer here involved was, for bargaining purposes, the Exchange, is undisputed. By definition the term "employer" includes "any person acting as an agent of an employer" (Sec. 2(2) and "person" includes one or more associations. (Sec. 2(1)) The Union, as bargaining representative of the employees of all eight members of the Exchange, was obliged to bargain with it in good faith. *American Newspaper Publishers Assn.* v. *N.L.R.B.,* 193 F. 2d 782, 805 (C.A. 7) (1951). By inevitably undermining the status of their collective representative, the Union was not meeting its statutory obligations. Conduct compelling this result could not be protected.

Further, the Act expressly proscribes unions from restraining or coercing an employer in the selection of its bargaining representative (Sec. 8(b)(1)(B)). Insofar as the individual employers, threatened with the devisive strike strategy, were concerned, the Union's conduct was inevitably calculated to attain this end. Here, ". . . the Respondents threatened strike action [was] a coercive tactic . . . calculated and designed to force the Employers to capitulate" to the Union's demands to break from their collective representative's stand. (*International Typographical Union,* 86 NLRB 951, 959). This was coercion in their selection of that representative, and unprotected. Cf. *Morand Bros. Beverage Co.* v. *N.L.R.B.,* 190 F. 2d 576, 582 (C.A. 7) (1951). Here, unlike the latter case, there was no impasse in negotiations. See 109 NLRB at pp. 454-455.

The Board was obliged to give effect to a policy consistent with the will of Congress as expressed through-

out the entire statutory scheme. Conduct at variance with the express proscriptions of that scheme cannot be held within the protection of the Act. Since this coercion was the foreseeable result of the piecemeal strike tactic adopted, it was within the statutory ban, whatever the Union's intent may have been. Cf. *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793 (1945). However, the end sought by the Union was plainly that, at least temporarily, each employer would abandon the position taken by its designated representative and capitulate. In any case, as noted above, the means used, despite "the fortuity of the coexistence of a labor dispute," deprived the employees whose representative utilized this device of the Act's protection. *Local Union No. 1229*, case at p. 476.[6]

IV. THE OTHER MEMBERS OF THE EXCHANGE CEASED THEIR OPERATIONS FOR CAUSE

The Board has not, as the Court below erroneously suggests (R. 52), held the activity here unprotected because it works an economic hardship on the employers, but because of the impropriety of the tactic used. See *Automobile Workers* and *Local Union No. 1229* cases, *supra*. Where either the tactic utilized or the end sought conflicts with public policy, it is not protected regardless of whether such policy has been expressed by statute or by judicial interpretation. Cf. *Building Service Employees* v. *Gazzam*, 339 U.S. 532 (1950); *Hughes et al.* v. *Superior Court*, 339 U.S. 532 (1950); *International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470 (1950). As noted above, this Court long ago enunciated the limitations on the concerted activities protected by the Act, and cautioned the Board to

[6] The responsibility of the employees for the acts of their representative is not in issue.

interpret them, in its discretion, with consideration of the whole statutory scheme. *Southern S.S. Co.*, *Fansteel Metallurgical* and *Sands Mfg. Co.*, cases, *supra.*

The device employed here resembles closely the "partial strike" whereby employees attempt to work and strike simultaneously. The right to strike which is protected involves the withholding of services and the consequent loss of compensation. As Judge Frank pointed out (R. 54), a strike against all would have been costly to the Union. So would it in the *Automobile Workers* case, *supra.* That does not justify a tactic whereby the Union pressures employers, who must continue to pay wages while faced with the threat of "hit and run," selective stoppages aimed at dividing their legitimate representation through their collective agent. Employees may not dictate when or where they will work. *Rockaway News Co.* v. *N.L.R.B.*, 345 U.S. 71, 75 (1953); *Local No. 1229* case, *supra,* and cases cited at p. 475 thereof. *Hoover Co.* v. *N.L.R.B.*, 191 F. 2d 380, 389 (C.A. 6) (1951); *N.L.R.B.* v. *Montgomery Ward & Co., Inc.*, 157 F. 2d 486, 496 (C.A. 8) (1946).

But regardless of the Union's object, it could not insist that the employees in part of the established unit draw their pay while others withdrew their services, leaving each other member of the Exchange in constant fear that it would be struck next. Under such circumstances the termination of the services of all employees until the strike at Frontier ceased was plainly for cause. *Montgomery Ward* case, *supra,* at pp. 496-497; *Hoover* case, at pp. 389-390.

In short, since the Union utilized, by the strike at Frontier, a means of securing its demands which

NLRB 1001 (1951); *General Baking Company*, 90 NLRB 588 (1950).

In dealing with the union on a multi-employer basis it is the duty of the employers to bargain as a unit through the association for all its members. It is likewise the duty of the union to deal with the employers as a unit. Special advantages which certain individual contracts might provide, either to one employer or to a unit of the local union, must be foregone. If difficulties are encountered during multi-employer contract negotiations, the employer group and the union must hold together in order to resolve such difficulties and to preserve the agreed bargaining unit. Any action taken by the union purportedly against a single member of the association arising out of contract negotiations with the association must be regarded as action taken in reality against the entire association.

Only in this fashion can the purpose and advantages of group bargaining be preserved. This is substantiated by the instant case, in which during the period of the strike and layoff the Union and the Exchange continued to bargain together and promptly agreed upon a new contract. This was the ultimate fulfillment of the basic aim of multi-employer bargaining, which is to provide a fair and equal bargaining position to the parties. Congress clearly intended to equalize collective bargaining power between employers and employees. *Short Title and Declaration of Policy*, Labor Management Relations Act, 1947, and *Findings and Policies* of the Act (61 Stat. 136, 29 U. S. C. Supp. III, §§ 141, 151).

When the multi-employer association is thus viewed as a unit, a strike by a union at one employer's plant arising from contract negotiations between the union and such employer's local association is more than a threat of strike against the other members. In reality it is a strike against the association itself, the agreed employer unit. The layoff

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

Definitions

Sec. 2. When used in this Act—

(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, ...

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a); . . .

should not be viewed as an individual and independent action by the separate group members. When the group is considered—and properly so—as a unit, the suspension of operations is the necessary and only practical reaction of the association, and is directly triggered by the strike.

CONCLUSION

We respectfully submit that the judgment of the Court below should be reversed.

Dated: November 30, 1956

Respectfully submitted,

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SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRUCK DRIVERS LOCAL UNION No. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR LINEN AND CREDIT EXCHANGE, OMAHA-COUNCIL BLUFFS BAKERY EMPLOYERS LABOR COUNCIL, BAY AREA COUNCIL OF BAKERY OPERATORS, BOSTON BAKERY EMPLOYERS LABOR COUNCIL, CHICAGO BAKERY EMPLOYERS LABOR COUNCIL, SEATTLE BAKERS' BUREAU, BAKERS OF WASHINGTON, INC., NEW YORK CITY BAKERY EMPLOYERS LABOR COUNCIL, FEDERATED EMPLOYERS OF NEVADA, INC., GREATER NEW YORK AND NORTHERN NEW JERSEY MILK DEALERS' LABOR COMMITTEE, AS *AMICI CURIAE*

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In the

Supreme Court of the United States

October Term, 1956

National Labor Relations Board, *Petitioner*, v. Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., *Respondent*.	No. 103

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR LINEN AND CREDIT EXCHANGE, OMAHA-COUNCIL BLUFFS BAKERY EMPLOYERS LABOR COUNCIL, BAY AREA COUNCIL OF BAKERY OPERATORS, BOSTON BAKERY EMPLOYERS LABOR COUNCIL, CHICAGO BAKERY EMPLOYERS LABOR COUNCIL, SEATTLE BAKERS' BUREAU, BAKERS OF WASHINGTON, INC., NEW YORK CITY BAKERY EMPLOYERS LABOR COUNCIL, FEDERATED EMPLOYERS OF NEVADA, INC., GREATER NEW YORK AND NORTHERN NEW JERSEY MILK DEALERS' LABOR COMMITTEE, AS *AMICI CURIAE*.

This case is before the Court on a writ of certiorari to the Court of Appeals for the Second Circuit which in setting aside the order and decision of the National Labor Relations Board (the Board) held that it was an unfair labor practice for members of the Linen and Credit Exchange (the Exchange), a local multi-employer association, to lay off employees in response to a strike against one employer.

The above-named multi-employer associations, as *amici curiae,* respectfully submit this brief pursuant to written consents of the parties, in accordance with Rule 42(2) of the Rules of this Court.

Interest of *Amici Curiae*

The Exchange, with eight employer members in Buffalo, Niagara Falls and Dunkirk, New York, is directly involved in this case.

The other *amici curiae* are also local multi-employer associations which, like the Exchange, have for many years negotiated contracts on behalf of their respective members in various cities and metropolitan areas throughout the United States. These *amici,* as well as the Exchange, fear that the decision below is contrary to the National Labor Relations Act, as amended (the Act), and the concept of labor relations therein provided. They further feel that the decision below will establish a precedent which will threaten the destruction of multi-employer bargaining, to the disadvantage of the employee, union, employer and the public.

Statement of the Case

Truck Drivers Local Union No. 449 (the Union) had negotiated labor contracts with the Exchange for thirteen years. In May 1953, while the Union and the Exchange continued to bargain collectively, the Union called a strike by the employees of one member of the Exchange in support of its demands against all eight members of the Exchange. The seven non-struck members of the Exchange thereupon closed their doors, but bargaining between the Union and the Exchange continued, and in a few days as a result of such bargaining a new collective bargaining agreement was reached between the Union and the Exchange on behalf of all its members (R. 17-20, 35-6, 44, 55).

Summary of Argument

Amici contend that a strike against one member of a multi-employer association constitutes a threat of strike against the other members which causes them operative problems justifying the layoff. *Amici* also contend that the Exchange is not only an entity in itself, but also is an "employer" under the Act. A strike at one member's plant is also in reality a strike against the entire association and against the bargaining procedure to which the Union and the Exchange agreed. Cessation of operations at the plants of other members is the obvious, necessary and the only practical recourse against such strike. Unless so viewed, multi-employer bargaining will be threatened with destruction.

Argument

Multi-employer bargaining, since the 1880's and particularly under the Wagner Act, has expanded concurrently with the growth of union strength. Today, multi-employer bargaining has become well established by voluntary agreement among unions and employers in metropolitan areas throughout the United States. There are now as many as 5,000,000 employees involved in multi-employer bargaining, over one-half of whom bargain at the local level with some 5,000 local employer associations.*

**Collective Bargaining with Associations and Groups of Employers*, 1947, *B. L. S. Bulletin No. 897*, pp. 1, 13; *Collective Bargaining Structures: The Employer Bargaining Unit*, 1953, *B. L. S. Report No. 1*, pp. 2, 8-11; Backman, *Multi-Employer Bargaining* (N. Y. U. Inst. of Labor Relations and Social Security, 1951), p. 10; Carpenter, *Employers' Associations and Collective Bargaining in New York City* (1950), pp. 28-9; Freidin, *The Taft-Hartley Act and Multi-Employer Bargaining* (U. of Pa. Press, 1948), pp. 4-5; Pierson, *Multi-Employer Bargaining: Nature and Scope* (U. of Pa. Press, 1948), pp. 17, 36; *Characteristics of Major Union Contracts*, Monthly Labor Review, July 1956 (pp. 805-11).

The Act recognizes that an employer includes "any person acting as an agent of an employer, directly or indirectly * * *" (Section 2(2)). "Person" is defined to include "associations" (Section 2(1)). The Board has previously held that a multi-employer unit may be considered an "employer" under the Act* and, acting pursuant to Section 9(b) of the Act, has recognized, both before and after the Taft-Hartley amendments, that local multi-employer groups are appropriate employer units for collective bargaining purposes. *Admiar Rubber Company*, 9 NLRB 407 (1938); *Waterfront Employers Association of the Pacific Coast*, 71 NLRB 80 (1946); *Ward Baking Company*, 78 NLRB 781 (1948); *Continental Baking Company*, 99 NLRB 777 (1952); *McAnary & Welter, Inc.*, 115 NLRB No. 165 (1956). Since the association is an employer it has the same right as an individual employer to lay off in the event of a strike. *Lengel-Fencil Company*, 8 NLRB 988 (1938). Furthermore, where such a multi-employer unit exists, it is the obligation and the duty of both the employers and the union to bargain in that group concerning terms of employment. (Section 8 (a)(5) and (b)(3) of the Act).

Unions and employers obtain important, practical benefits from multi-employer bargaining. In the absence of local multi-employer bargaining, when one union representing employees of several employers bargains with each employer separately the general result is the unfair system

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**Shipowners' Association of the Pacific Coast*, 7 NLRB 1002 (1938); *Mobile Steamship Association*, 8 NLRB 1297 (1938); *Alston Coal Company*, 13 NLRB 683 (1939); *Federated Fishing Boats of New England and New York, Inc.*, 15 NLRB 1080 (1939); *Associated Banning Company*, 19 NLRB 140 (1940); *John Kausel*, 28 NLRB 906 (1941); *Standard Slag Company*, 63 NLRB 313 (1945); *Waterfront Employers Association of the Pacific Coast*, 71 NLRB 80 (1946); *Association of Motion Picture Producers, Inc.*, 79 NLRB 466 (1948), 85 NLRB 902 (1949); *The Everett Automotive Jobbers Association*, 81 NLRB 304 (1949); *Bunker Hill and Sullivan Mining and Concentrating Co.*, 89 NLRB 243 (1950).

of "pattern bargaining" or "whipsawing". Extra expense of negotiation of separate contracts with each employer is incurred and inequitable contract provisions are likely—and are in fact, frequent. Without multi-employer bargaining, the small employer, acting alone, has little voice in determining his contract provisions.*

Multi-employer bargaining eliminates these disadvantages and brings about a system of collective bargaining which is fair and equitable to both sides. Small and moderately-sized employers, as in this case, are thereby enabled to bargain on more nearly equal terms. The association cannot single out the employees of one plant for treatment contrary to that accorded to others. Nor can the union single out a particular employer for discriminatory treatment. Negotiations are carried out on a unitary basis to yield a uniform contract standardizing wages, hours, vacations, seniority, grievance machinery and other conditions of employment for all workers similarly engaged in association-organized industries located in a prescribed geographical area. Better trained labor relations personnel are utilized and the master contract is a product of informed application of bargaining power equally apportioned between the association and the union. Local multi-employer bargaining in practice has promoted industrial peace.*

For these reasons, employers and unions have found multi-employer bargaining mutually acceptable after practical tests, as a major improvement in collective bargaining

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*Carpenter, *op. cit. supra*, pp. 10-14, 48-52, 61, 243-4, 368-9; Backman, *op. cit. supra*, pp. 9, 13-14; Freidin, *op. cit. supra*, p. 5, fn. 5, 13-14; Kaplan, *Negotiating Problems of the Trucking Industry*, Burke, *Negotiating Problems of the Building Industry*, Witte, *An Institutional Approach*, Proceedings of the Conference on Industry-Wide Collective Bargaining (U. of Pa. Press, 1949) pp. 21, 28, 33, 74-6, 81, 87; Jones, *The NLRB and the Multiemployer Unit*, 5 Labor Law Journal 34, 45, fn. 90 (Jan. 1954).

met. ods over earlier less satisfactory results. As David Kaplan, former chief economist for the Teamsters, has stated:*

> "* * * if the employers really want any representation in collective bargaining, they have to get that participation through some group. Otherwise, we would have to make the contract with those employers who could get together as a group and then we would have no other alternative but to impose that same contract on everyone else.
>
> "So I think that in the type of industries that I am discussing now [*e.g.*, local trucking industry]—it isn't a question of this or that type of bargaining—but it is merely a question of multi-employer bargaining, or no bargaining at all."

The demonstrated advantages of multi-employer bargaining amply justify the decision of the Board in the instant case, and similar decisions of the Seventh, Eighth and Ninth Circuits,** that members of an association have the right to invoke a temporary cessation of operations when a strike against one member occurs in the midst of contract negotiations with the association.

The Board's ruling must be upheld if the multi-employer bargaining arrangement is to continue, for employer unity is essential to the multi-employer conception. Otherwise, if at the bargaining table the union should find it may not realize any of its contract demands, whether reasonable or trivial, it could thereupon strike one or more individual employers at will and thus seek to obtain such demands by individual capitulations without any possibility of effective

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*Kaplan, *op. cit. supra*, p. 87.

**_Morand Bros. Beverage Co._ v. *National Labor Rel. Bd.*, 7 Cir., 190 F. 2d 576 (1951), 204 F. 2d 529 (1953), *cert. den.* 346 U. S. 909 (1953); *Leonard* v. *National Labor Relations Board*, 9 Cir., 197 F. 2d 435 (1952), 205 F. 2d 355 (1953); *National Labor Rel. Bd.* v. *Spalding Avery Lumber Co.*, 8 Cir., 220 F. 2d 673 (1955); *National Labor Relations Bd.* v. *Continental Baking Co.*, 8 Cir., 221 F. 2d 427 (1955).

resistance by the association with which it agreed to bargain. In fairness, the union should not be permitted thus to obtain all the advantages of multi-employer bargaining without assuming any of its obligations.

The Board, in rendering its decision, reasoned "that a strike by employees against one employer-member of a multi-employer bargaining unit constitutes a threat of strike action against the other employers, which threat, *per se*, constitutes the type of economic or operative problem at the plants of the nonstruck employers which legally justifies their resort to a temporary lockout of employees." *Buffalo Linen Supply Company*, 109 NLRB 447, 448-9 (1954), [R. 34, 37].

Amici, while agreeing with the rationale of the Board, believe that stronger reasons may be invoked by this Court in sustaining the right of a multi-employer bargaining association to suspend operations during a strike at one of the plants.

In order for multi-employer collective bargaining agreements to be possible, employers and the union must abide by certain obligations to the group bargaining unit. Each party must bargain on a group basis. Indeed, the association and the union are bound by the collective bargaining agreement negotiated between them for the length of the contract. Furthermore, contrary to the assertion of the Court of Appeals below,* the Board has refused to allow employer members as well as union members to withdraw from the group while a contract is being negotiated. *Purity Stores, Ltd.*, 93 NLRB 199 (1951); *Engineering Metal Products Corporation*, 92 NLRB 823 (1950); *McAnary & Welter, Inc.*, 115 NLRB No. 165 (1956); *Atlas Storage Division, P & V Atlas Industrial Center*, 100 NLRB 1443 (1952); *Washington Hardware Company*, 95

**Truck Drivers Local Union* v. *National Labor Rel. Bd.*, 2 Cir., 231 F. 2d 110, 115 (1956), [R. 42, 49].

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
TRUCK DRIVERS LOCAL UNION No. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR SPECIAL LEAVE TO FILE SUPPLEMENTAL BRIEF FOR LINEN AND CREDIT EXCHANGE, OMAHA-COUNCIL BLUFFS BAKERY EMPLOYERS LABOR COUNCIL, BAY AREA COUNCIL OF BAKERY OPERATORS, BOSTON BAKERY EMPLOYERS LABOR COUNCIL, CHICAGO BAKERY EMPLOYERS LABOR COUNCIL, SEATTLE BAKERS' BUREAU, BAKERS OF WASHINGTON, INC., NEW YORK CITY BAKERY EMPLOYERS LABOR COUNCIL, FEDERATED EMPLOYERS OF NEVADA, INC., GREATER NEW YORK AND NORTHERN NEW JERSEY MILK DEALERS' LABOR COMMITTEE, AS *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, v. TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L., *Respondent*.	No. 103

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR SPECIAL LEAVE TO FILE SUPPLEMENTAL BRIEF FOR LINEN AND CREDIT EXCHANGE, ET AL., AS *AMICI CURIAE*.

The Linen and Credit Exchange, which is directly involved in this case, and the other *amici curiae* named above, respectfully move that its counsel be granted leave to file a Supplemental Brief in the form attached hereto.

As justification for this motion *amici curiae* state that the argument set forth in the said brief supplements, clarifies and emphasizes contentions presented in the briefs heretofore filed in this case and at the oral argument; that counsel for these *amici curiae* intended to present these matters to the Court by oral argument for which he had been allocated by the Solicitor General ten minutes of the latter's time; that the Solicitor General used his entire allotted time and that counsel was accordingly deprived of the oppor-

tunity to present these matters to the Court at the hearing of this case; and that counsel also refrained from filing a supplemental brief prior to the oral argument in the belief that these matters would be clarified and emphasized by counsel at the oral argument.

It is also believed that many of the matters dealt with in the said brief are responsive to questions raised by the Court and not adequately answered either in the briefs heretofore filed or upon the oral argument.

Amici curiae therefore respectfully move that this Court grant its counsel leave to file said supplemental brief.

Dated: January 25, 1957.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR LINEN AND CREDIT EXCHANGE, ET AL., AS AMICI CURIAE.

While the Board, upon the oral argument, was noncommittal, all *amici* concur in the contention, fully set forth in the briefs of some *amici*, that a single employer may properly lock out his employees as part of the bargaining process and in the absence of anti-union motivation. See Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. of Chicago L. Rev. 70 (Autumn 1956). The legality of such a lockout is recognized: (1) by Section 8(d)(4) (waiting period), Section 203(c) (mediation) and Sections 208(a) and 210 (imposition and vacation of injunction) of the Act; (2) by various wartime and peacetime labor orders temporarily limiting or restraining the right to lockout; (3) by the fact that the Board has on

occasion sanctioned a lockout on a relatively weak showing of economic hardship; and (4) by the preservation of the right of lockout in recent labor contracts in, *inter alia*, the steel and trucking industries. See brief on behalf of Printing Industry, p. 16-19; brief on behalf of various west coast associations, p. 13-16.

We further agree with the contention, set forth in the brief of some *amici*, that the strike was an attempt to coerce an employer in the selection of its representative for bargaining purposes. It was either an unfair labor practice under Section 8(b)(1)(B) of the Act or constituted concerted activity unprotected by the Act. It was not the traditional strike for better wages but was for the purpose of destroying, at least temporarily, the effectiveness of the Exchange as a bargaining agent, while the Union continued to recognize and deal with it.

We also agree with the Board that the strike against Frontier was a deliberate and present threat of strike against all other members of the Exchange, and that the employers were entitled to defend against it.

We go one step further, however. We contend that the strike at Frontier was more than a threat of strike against the other members of the Exchange. It was an actual and existing strike against the employer bargaining unit, which functioned with the consent of both the Union and the employers. As a practical matter, the reaction of the employers was almost automatic. There was only one way for them to assure that the principal object of the bargaining arrangement would be carried out—namely, to close the other plants and thus assure that bargaining with the Union would remain on the recognized multi-employer basis.

This view of the multi-employer bargaining process renders unnecessary consideration of the legality of a single employer lockout for bargaining purposes, since the

strike at Frontier is, in fact, a strike against the Exchange itself. It also renders unnecessary consideration of whether the strike was an unfair labor practice or an unprotected activity, since, whether or not the strike was technically unfair, the employers were entitled to defend against it.

The multi-employer bargaining procedure, is, in fact, a unique, unitary concept with an established record for reducing industrial strife. Its preservation justifies employers in taking normal steps to protect the bargaining system agreed upon, certainly in the absence of any action on the part of the Union to disaffirm the system.

The unitary nature of the bargaining arrangement is established by a history of bargaining for thirteen years on that basis, and by the fact that the Union at all times recognized the Exchange as the agent for its members and reaffirmed that recognition by continuing to bargain with it while the strike was in effect. It is also established by the fact that there was but one collective bargaining agreement, and not eight different agreements between the Union and each member. The single agreement was signed by the Union, the Exchange and all employer members of the Exchange, whereupon conformed copies were given to all signatories. R. 17.

The ultimate question in this case is whether the Exchange members have committed an unfair labor practice. Whatever was done by them in this case was eminently fair. Whatever coercion might exist was on the other foot. It was the Union which used the strike against one employer to coerce the Exchange into a weakened bargaining position. The employers' response was designed to, and in this case was successful in, preserving for the future a multi-employer bargaining arrangement which has been found so stabilizing, so beneficial to labor and industry, and so productive of labor peace in many small industries in so many localities.

CONCLUSION

We respectfully submit that the judgment of the Court below should be reversed.

Dated: January 25, 1957.

Respectfully submitted,

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